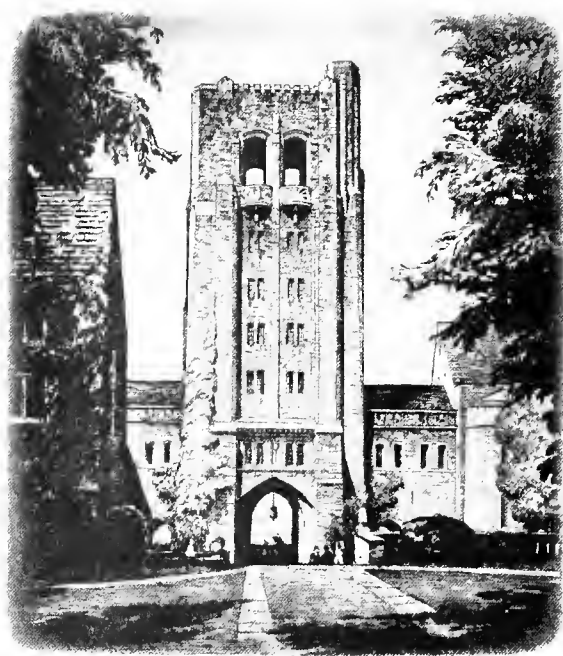




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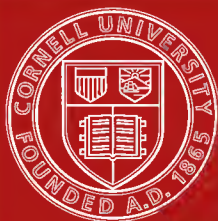
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OUTLINES
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BY

RICHARD RINGWOOD, Esq., M.A.,

OF THE MIDDLE TEMPLE AND N.E. CIRCUIT; BARRISTER-AT-LAW;
LATE SCHOLAR OF TRINITY COLLEGE, DUBLIN, AND FIRST SENIOR MODERATOR;
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AND LATE LECTURER ON COMMON LAW TO THE INCORPORATED LAW SOCIETY.

Third Edition.

LONDON:
STEVENS AND HAYNES,
Law Publishers,
BELL YARD, TEMPLE BAR.

1898.

1962-5

BRADBURY, AGNEW, & CO. LD., PRINTERS,
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PREFACE TO THE THIRD EDITION.

IN this Edition many fresh cases of importance have been added. The judgment of the House of Lords in *Allen v. Flood*, and its effect on previous cases, have been dealt with. The text of the Workmen's Compensation Act, 1897, has been given in full and explained, and the decisions on the Employers Liability Act, 1880, have been noted. Lastly, greater attention has been paid to the valuable judgments of the Irish Courts.

R. R.

TEMPLE,
February, 1898.

PREFACE TO THE FIRST EDITION.

HAVING had the honour of being appointed Lecturer on Common Law by the Council of the Incorporated Law Society, I in the present year delivered, before the Students at the Law Institution, a Course of Lectures on the Law of Torts. These Lectures form the groundwork of the present volume, which is now published at the request of many Students, and by the permission of the Council.

R. R.

November, 1887.

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A. & E.	Adolphus & Ellis.
Adm.	Admiralty.
App. Cas.	Law Reports, Appeal Cases.
Arn.	Arnold.
B. & Ad.	Barnewall & Adolphus.
B. & Al.	Barnewall & Alderson.
B. & C.	Barnewall & Cresswell.
B. & P. N. R.	Bosanquet & Puller, New Reports.
B. & S.	Best & Smith.
Bing.	Bingham.
Bkey.	Bankruptcy.
Bro. P. C.	Brown's Parliamentary Cases.
Buller's N. P.	Buller's Nisi Prius.
Bul. & L.	Bullen & Leake.
Burr.	Burrow's Reports.
C. B.	Common Bench Reports.
C. C. R.	Crown Cases Reserved (Law Reports).
C. & J.	Crompton & Jervis.
C. & K.	Carrington & Kirwan.
C. L. R.	Common Law Reports.
C. M. & R.	Crompton, Meeson, & Roscoe.
C. P.	Common Pleas (Law Reports, Law Journal).
C. P. D.	Common Pleas Division (Law Reports).
C. & P.	Carrington & Payne.
Camp.	Campbell.
Car. & M.	Carrington & Marshman.
Cf.	<i>confer</i> , compare.
Ch.	Chancery (Law Reports, Law Journal).
Ch. D.	Chancery Division (Law Reports).

Cl. & F.	Clark & Finnelly.
Co.	Coke.
Cowp.	Cowper.
Cox C. C.	Cox's Criminal Cases.
Cro. Car.	Croke <i>tempore</i> Charles I.
Cro. Eliz.	Croke <i>tempore</i> Elizabeth.
D. & L.	Dowling & Lowndes.
D. & M.	Davison & Merivale.
D., N. S.	Dowling, New Series.
D., P. C.	Dowling's Practice Cases.
D. & R.	Dowling & Ryland.
Danv.	Danvers.
De G. F. & J.	De Gex, Fisher, & Jones.
De G. M. & G.	De Gex, Macnaghten, & Gordon.
Deac.	Deacon.
<i>diss.</i>	<i>dissentiente</i> , dissenting.
Dougl.	Douglas.
E. & B.	Ellis & Blackburn.
E. B. & E.	Ellis, Blackburn, & Ellis.
E. & E.	Ellis & Ellis.
Eq.	Equity (Law Reports).
Eq. Rep.	Equity Reports.
Esp.	Espinasse.
Ex.	Exchequer Reports, Exchequer (Law Reports, Law Journal).
Ex. D.	Exchequer Division (Law Reports).
F. & F.	Foster & Finlason.
F. N. B.	Fitzherbert's Natura Brevium.
Fort.	Fortescue.
G. & D.	Gale & Davison.
Giff.	Giffard.
H. & C.	Hurlstone & Coltman.
H. & H.	Horn & Hurlstone.
H. of L. Cas.	House of Lords Cases.
H. & N.	Hurlstone & Norman,
H. & R.	Harrison & Rutherford.
H. & W.	Harrison & Wollaston.
Hob.	Hobart.

Ir.	Irish.
J. & H.	Johnson & Hemming.
J. P.	Justice of the Peace.
Jur.	Jurist.
Keb.	Keble.
L. J.	Law Journal, New Series.
L. R.	Law Reports.
L. T.	Law Times Reports, New Series.
Leon.	Leonard.
Lev.	Levinz.
M. & A.	Montagu & Ayrton.
M. C.	Magistrates' Cases (Law Journal).
M. & G.	Manning & Granger.
M. & P.	Moore & Payne.
M. & R.	Moody & Robinson.
M. & S.	Maule & Selwyn.
M. & Scott	Moore & Scott.
M. & W.	Meeson & Welsby.
Macq.	Macqueen (Scotch).
Marsh.	Marshall.
Mod.	Modern Reports.
Moore P. C. C.	Moore's Privy Council Cases.
N. C.	New Cases.
N. & M.	Neville & Manning.
N. R.	New Reports.
N. S.	New Series.
O. S.	Old Series.
P. A. 1890.	Partnership Act, 1890.
P. C.	Privy Council (Law Reports, Law Journal).
P. D.	Probate Division (Law Reports).
P. D. & A.	Probate, Divorce, & Admiralty (Law Journal).
P & D.	Perry & Davison.
Q. B.	Queen's Bench Reports, Queen's Bench (Law Reports, Law Journal).
Q. B. D.	Queen's Bench Division (Law Reports).

R. S. C.	Rules of the Supreme Court.
Railw. Cas.	Railway Cases.
Raym., Ld.	Lord Raymond.
Salk.	Salkeld.
Saund.	Saunders.
S. C.	Same case.
Sc.	Scotch.
Sid.	Siderfin.
Sm. L. C.	Smith's Leading Cases.
Stark.	Starkie.
Sumn. Rep.	Sumner's Reports (American).
T. L. R.	Times' Law Reports.
Taunt.	Taunton.
Tyr.	Tyrwhitt.
Tyr. & G.	Tyrwhitt & Granger.
Ventr.	Ventris.
Vern.	Vernon.
Ves.	Vesey.
Vin. Abr.	Viner's Abridgment.
W. R.	Weekly Reporter.
Wils.	Wilson.
Winch.	Winch's Reports.
Wm. Bl.	William Blackstone.
Wms. Saund.	Williams' Notes to Saunders' Reports.

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OUTLINES

OF THE

LAW OF TORTS.

CHAPTER I.

INTRODUCTORY : TORTS GENERALLY.

A TORT is treated in the Common Law Procedure Act, 1852, as a wrong independent of contract (*a*), but if such an expression be regarded as a definition, it is of course of but little help towards the analysis of a tort. Though our judges have shown a reluctance to commit themselves to any definition of the word, yet there are a few cases which will be of material assistance in determining what amounts to a tort or wrong for which a remedy can be obtained by an action. "If," says Bayley, J., "a man sustains damage by the wrongful act of another, he is entitled to a remedy; but to give him that title two things must concur—damage to himself, and a wrong committed by the other. That he may have sustained damage is not of itself sufficient" (*b*). As may be gathered from the concluding portion of the judgment, a party who seeks redress for the wrongful act of another should not only shew that the act was wrongful, but that thereby some injury has been done to some right of his own. But "actual perceptible damage is not indispensable as the foundation of an

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Tort defined.

*Injuria sine
damno* action-
able.

(*a*) See schedule B.

(*b*) *Ree v. Commissioners of Pugham*, 8 B. & C. 355, at p. 262.

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action ; it is sufficient to shew the violation of a right, in which case the law will presume damage ; *injuria sine damno* is actionable, as was laid down in the case of *Ashby v. White* (c) by Lord Holt, and in many subsequent cases (d). In *Ashby v. White* Lord Holt laid down that a man who had a right to vote at an election for a member of Parliament might maintain an action against the returning officer for refusing to record his vote, though the person for whom he offered to vote was elected. The learned judge, in the course of his celebrated judgment, says : “ Surely every injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary, for a damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his right. . . . If a man gives another a cuff on the ear, though it cost him nothing, no, not so much as a little diachylon, yet he shall have his action, for it is a personal injury. So a man shall have an action against another for riding over his ground, though it do him no damage ; for it is an invasion of his property, and the other has no right to come there.”

In an American case (e), referred to with approval by Bayley, J. (f), Mr. Justice Story lays down the following proposition :—

“ I can very well understand that no action lies in a case where there is *damnum absque injuria*—that is, where there is a damage done without any wrong or violation of any right of the plaintiff. But I am not able to understand how it can correctly be said, in a legal sense, that an action will not lie, even in case of a wrong or violation of a right, unless it is followed by some perceptible damage which can be established as a matter of fact ; in other words, that *injuria sine damno*

(c) 2 Ld. Raym. 938 ; 1 Sm. L. C. 231.

(d) *Embrey v. Owen*, 6 Ex. 353, 368.

(e) *Webb v. Portland Manufacturing Company*, 3 Summ. Rep. 189.

(f) *Embrey v. Owen*, 6 Ex. at p. 368.

is not actionable. On the contrary, from my earliest reading I have considered it laid up among the very elements of the common law, that, wherever there is a wrong, there is a remedy to redress it; and that every injury imports damage in the nature of it; and, if no other damage is established, the party injured is entitled to a verdict for nominal damages. *A fortiori*, this doctrine applies where there is not only a violation of a right of the plaintiff, but the act of the defendant, if continued, may become the foundation, by lapse of time, of an adverse right in the defendant; for then it assumes the character, not merely of a violation of a right, tending to diminish its value, but it goes to the absolute destruction and extinguishment of it. Under such circumstances, unless the party injured can protect his right from such a violation, by an action, it is plain that it may be lost or destroyed without any possible remedial redress. In my judgment, the common law countenances no such inconsistency, not to call it by a stronger name. Actual perceptible damage is not indispensable as the foundation of an action. The law tolerates no further inquiry than whether there has been the violation of a right. If so, the party injured is entitled to maintain his action for nominal damages in vindication of his right, if no other damages are fit and proper to remunerate him."

It is clear, therefore, that where a man commits a wrongful act in violation of some legal right of another—whether it be his right to personal security, his right to be left undisturbed in the possession of his property, or his right to enjoy his good reputation, or any other right—the wrongdoer may be held liable in an action, though no appreciable damage may have been caused through his act; in other words, *injuria sine damno*—*damnum* being understood as meaning mere loss—is actionable. But, on the other hand, where there is simply a *damnum absque injuriâ*—that is to say, where a man sustains a loss, but it is not

*Damnum
absque injuriâ
not actionable.*

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caused by any wrongful act done in violation of his legal rights, by another person—no action can be brought.

The following cases illustrate the principle that a loss is not actionable where no right has been violated :—

An action was brought against the returning officer of a borough for refusing to reckon the plaintiff's vote amongst those given at an election for the borough. According to the state of the law at that time, the plaintiff, though he was on the register, had in fact lost the right to vote by reason of non-residence, but the defendant, whose only duty was to satisfy himself as to the identity of the person claiming to vote, and that he had not voted before at that election, wilfully, but not maliciously, instituted an inquiry into the plaintiff's right to vote, and upon the plaintiff appearing not to be duly qualified in point of residence, refused to count his vote. The plaintiff thereupon brought his action, but he failed on the ground that no right had been violated, because, by virtue of the Act of Parliament he had no right to vote (*g*). So too, though a subject may have a right to present a petition to Parliament, he has no right to compel any individual member, even the member who represents his own constituency, to present the petition (*h*).

Again, if a person has a successful school with a large number of pupils, but the school gradually declines in consequence of a rival and better establishment of the same kind being set up in the neighbourhood, no action for the pecuniary loss thereby caused can be maintained against the proprietor of the rival school, for he has done no wrongful act in violation of the other's rights (*i*). So, again, the owner of a piece of land may build a wall thereon, so as to block up

(*g*) *Pryce v. Belcher*, 3 C. B. 58 ; 4 C. B. 866.

(*h*) *Chaffers v. Goldsmid*, (1894) 1 Q. B. 186.

(*i*) See *Keeble v. Hickeringill*, 11 East, at p. 574, 5 (n).

the windows of a new house built on adjoining land, if the owner of the house has not got, by grant or prescription, a right to the light so excluded.

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The foregoing remarks will assist in the understanding of one large class of the actions brought in the Queen's Bench Division. They are sometimes called actions *ex delicto*, or actions arising out of tort, as distinguished from actions *ex contractu*, that is to say, arising from contract. That is the main division of common-law actions, but at the same time it may be observed that even before the recent Judicature Rules, under which one is not obliged to lay his action in any particular form, the line dividing these two classes of actions was not very sharp or distinct. For example, in many cases, though a contract had been made between the plaintiff and the defendant, and afterwards broken, the action was not necessarily cast in the form of an action *ex contractu*. In the case of *Brown v. Boorman* (*k*), Lord Campbell says: "Wherever there is a contract, and something to be done in the course of the employment which is the subject of that contract, if there is a breach of duty in the course of that employment, the plaintiff may either recover in tort or in contract;" that is to say, "where there is an employment, which employment itself creates a duty, an action on the case will lie for a breach of that duty, although it may consist in doing something contrary to an agreement made in the course of such employment by the party upon whom such duty is cast" (*l*). In such cases the principle appears to be that the contract creates a duty, and the neglect to perform that duty, or the non-feasance, is a ground of action for a tort (*m*). To illustrate this: Suppose a solicitor be employed to transact certain business, and he does not transact it, or does it negligently. In that case the action against him might be either an action *ex contractu*, for breach of contract,

Actions *ex delicto* and *ex contractu* distinguished.

(*k*) 11 C. & F. 1, at p. 44.

(*l*) See per Jervis, C.J.: *Conway v. Earle*, 10 C. B. 73, at p. 83.

(*m*) Per Tindal, C.J.: *Boorman v. Brown*, 3 Q. B. at p. 526.

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or an action *ex delicto*, for breach of duty in not transacting, or in transacting negligently, the business which he had undertaken (*n*). Cases of this kind are classified by some writers as *quasi* torts.

Public wrong:
Remedy
(1) by indictment.

We have now seen that where there has been an *injuria*, or wrongful act, or omission, whereby a person's right has been violated, an action for damages will lie. But if the right which has been violated is not peculiar to any one individual, but common to all the public, an action cannot be maintained by any person who has not suffered some damage beyond the rest of the public, but the appropriate remedy in such a case is to present an indictment against the wrongdoer. Thus, for example, in *Winterbottom v. Lord Derby* (*o*), the plaintiff brought an action against the defendant for the obstruction of a public footway; but judgment went against him, because he was unable to shew that he had suffered any more inconvenience or loss than the rest of the public, having simply proved that he had sometimes been delayed in removing the obstruction, and sometimes obliged to turn aside by another way. "If," says Chief Baron Kelly, in delivering judgment, "we were to hold that everybody who merely walked up to the obstruction, or who chose to incur some expenses in removing it, might bring his action on the case for being obstructed, there would really be no limit to the number of actions which might be brought." But if in the case just mentioned the plaintiff, being ignorant of the obstruction, walked against it or into it, and broke his leg, an action could no doubt have been successfully maintained. Nor in such a case would an action necessarily have failed by reason of the fact that between the placing of the obstruction on the highway by the defendant and the damage to the plaintiff there was an intervening act by a third person, *e.g.*, the moving of the obstruction

by action.

(*n*) See *Boorman v. Brown*, *ubi supra*.

(*o*) L. R. 2 Ex. 316.

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a few yards, if the defendant might have anticipated that mischief in some way might arise from what he did (*p*). Again, in *Hart v. Bassett* (*q*), the plaintiff, a farmer of tithes, was prevented, by the defendant's obstruction of a highway, from carrying them home, and the obstruction was attended with considerable loss to the plaintiff. He had to take tithe, and he was liable to an action if he allowed the tithe to be injured on the ground, or if it was not taken within a reasonable time. Consequently, he was obliged, by reason of the obstruction, to spend extra money in the discharge of his lawful business, and so he suffered peculiar pecuniary damage, and therefore had a right of action (*r*).

Secondly, though a person may have done a wrongful act, and though damage to another may be traced from it, yet if such damage be not the natural or probable consequence of such wrongful act, no redress can be had by action. This may be seen from the case of *Sharp v. Powell* (*s*). In that case the defendant's servant (in breach of the Police Act, 2 & 3 Vict. c. 47, s. 54), washed a van in a public street in London, and allowed the waste water to run down a gutter towards a grating leading to the sewer about twenty-five yards off. In consequence of the extreme severity of the weather the grating was obstructed by ice, and the water flowed over a portion of the roadway, which was badly paved and uneven, and it there became frozen. There was no evidence that the defendant knew of the grating being obstructed. The plaintiff's horse, whilst being led past the spot, slipped upon

Remoteness of
damage.

(*p*) See *Clark v. Chambers*, 3 Q. B. D. 327, 338, cited *post*, Chap. XI. p. 253 : see also *Engelhart v. Farrant*, (1897) 1 Q. B. 240.

(*q*) 1 L. Raym. 486 ; L. R. 2 Ex. p. 321.

(*r*) In *Boyd v. Great Northern Railway Company of Ireland*, Irish Rep. (1895) 2 I. R. 555, a member of the public, who, by the defendants' negligence, was delayed for an unreasonable time at a level crossing over a highway, and thereby sustained damage, was held entitled to an action.

(*s*) L. R. 7 C. P. 253.

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the ice and broke its leg. The plaintiff thereupon brought an action against the defendant for the loss of his horse, but a judgment of nonsuit against him was upheld, on the ground that the breaking of the horse's leg was a consequence too remote to be attributed to the wrongful act of the defendant. Chief Justice Bovill, in his judgment, says: "Where there is no reason to expect it and no knowledge in the person doing the wrongful act that such a state of things exists as to render the damage probable, if injury does result to a third person it is generally considered that the wrongful act is not the proximate cause of the injury, so as to render the wrongdoer liable to an action" (t). The well-known case of *Scott v. Shepherd* (u) will give some assistance in deciding what events may be held to be the probable consequences of a wrongful act. In that case the defendant threw a lighted squib into a market-house where there was a large number of people. The squib fell upon the stall of one Yates, who sold gingerbread. Thereupon, one Willis, an assistant of Yates, in order to prevent injury to himself and the gingerbread, threw the lighted squib across the market-house, where it fell upon the stall of one Ryal; and Ryal, who also sold gingerbread, instantly, and to save his own goods from being injured, took up the lighted squib from his stall, and threw it to another part of the market-house, and in so doing hit the plaintiff in the face, and, the squib thereupon bursting, the plaintiff's eye was put out. The Court held that the defendant, though the

Scott v. Shepherd.

(t) Perhaps the defendant might have succeeded on another ground, namely, that what he did was only wrongful by reason of the statute, and that the mischief caused by him was not the kind of mischief aimed at by the statute, which made it wrong to do certain acts "to the annoyance of the inhabitants or passengers" see *Ward v. Hobbs*, 4 App. Cas. 13. The mere washing of the van in the street was not wrongful so far as plaintiff was concerned, but the obstruction of the highway in *Clark v. Chambers*, 3 Q. B. D. 327, *supra*, was wrongful against all who had occasion to pass along the highway. *Sharp v. Porvill* seems to have been approved by the Court of Appeal in *Hard-baker v. Ilke District Council*, (1896) 1 Q. B. 335, 350.

(u) 1 Sm. L. C. 438.

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injury was not immediately caused by him, was liable to the plaintiff, on the ground that the natural and probable consequence of his act was injury to somebody, and that what the intermediate parties, Willis and Ryal, did was by necessity, and that necessity was imposed on them by the defendant.

There is still a third class of cases where, though there has been a wrongful act done in violation of a person's right, there is no right of action. So long as a judge acts within his jurisdiction, no action can be brought against him, however maliciously he may act in the performance of his duties (*x*). So, too, a witness cannot be held liable, in an action of slander, for what he says in the witness-box with reference to the inquiry on which he has been called to give evidence, even though he wilfully go out of his way to commit perjury (*y*); and a similar rule prevails with regard to statements made by an advocate in the conduct of a case (*z*).

Judges, &c., under certain circumstances protected from actions *ex delicto*.

Felonies.—With regard to torts which are also felonies, the law is in a very curious, and perhaps we should say unsatisfactory, state. It will be found laid down in many text-books that, where a person has committed a felony whereby another person is injured, the injured party cannot recover damages in a civil action till he has first done his duty to his country by prosecuting the felon. "No doubt," says Cockburn, C.J., "it has been long established as the law of England that where an injury amounts to an infringement of the civil rights of an individual, and at the same time to a felonious wrong, the civil remedy—that is, the right of redress by action—is suspended until the party inflicting the injury has been prosecuted" (*a*).

State of the law as regards civil remedy where wrongful act amounts to felony.

(*x*) *Revis v. Smith*, 18 C. B. 126; *Darwins v. Paulst*, L. R. 5 Q. B. 94; *Anderson v. Gorrie*, (1895) 1 Q. B. 668.

(*y*) *Seaman v. Nethercliff*, 2 C. P. D. 53.

(*z*) *Manster v. Lamb*, 11 Q. B. D. 588.

(*a*) *Wells v. Abrahams*, L. R. 7 Q. B. 554.

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Again, in *Ex parte Ball*, *In re Shepherd* (b), Bramwell, L.J., says: "The law on this subject is in a remarkable state. For three hundred years it has been said, in various ways, by judges, many of the greatest eminence, without intimating a doubt except in one instance, that there is some impediment to the maintenance of an action for a debt arising in this way. The doubt is that which was not so much expressed by Mr. Justice Blackburn in *Wells v. Abrahams* (c) as to be inferred from what he said. But, though such an opinion has been entertained and expressed for all this time, there are but two cases in which it has operated to prevent the debt being enforced. These two cases are *Wellock v. Constantine* (d) and *Ex parte Elliott*" (e). Then his lordship, in dealing with the opinion, expressed for centuries, that the felonious origin of a debt is in some way an impediment to its enforcement, asks, In what way? and says: "I can only think of four possible ways—(1) That no cause of action arises at all out of a felony; (2) that it does not arise till prosecution; (3) that it arises on the act, but is suspended till prosecution; (4) that there is neither defence to, nor suspension of, the claim by, or at the instance of, the felon debtor, but that the Court, of its own motion, or on the suggestion of the Crown, should stay proceedings till public justice is satisfied. It must be admitted that there are great difficulties in the way of each of these theories. That the first is not true is shewn by *Marsh v. Keating* (f), where it was held that, prosecution being impossible, a felony gave rise to a recoverable debt. It is difficult to suppose that the second supposed solution of the problem is correct. That would be to make the cause of action the act of the felon plus a prosecution. The cause of action would not arise till

(b) 10 Ch. D. 667, at p. 671.

(c) *Ubi supra*.

(d) 2 H. & C. 146.

(e) 3 M. & A. 110.

(f) 1 Bing. N. C. 198.

after both. Till then the Statute of Limitations would not run. In such a case as the present, or where the felon had died, it would be impossible. And it is to be observed that it is never suggested that the cause of action is the debt and the prosecution. The third possible way is attended by difficulties. The suspension of a cause of action is a thing nearly unknown to the law. It exists where a negotiable instrument is given for a debt, and in cases of compositions with creditors, and these were not held till after much doubt and contest. There may be other instances. And what is to happen? Is the Statute of Limitations to run? Suppose a debtor or his representative sue the creditor, is his set-off suspended? Then how is the defence of impediment to be set up? By plea? That would be contrary to the rule, 'Nemo allegans suam turpitudinem est audiendus.' Besides, it would be absurd to suppose that the debtor himself ever would so plead, and face the consequences. Then, is the fourth solution right? Nobody ever heard of such a thing. Nobody, in any case or book, ever suggested it till Mr. Justice Blackburn did as a possibility. Is it left to the Court to find it out on the pleadings? If it appears on the trial, is the judge to discharge the jury? How is the Crown to know of it? There are difficulties, then, in all the possible ways in which one can suppose this impediment to be set up to the prosecution of an action. But, again, suppose it can be, what is the result? It has been held that, when the felon is executed for another felony, the claim may be maintained. What is to happen when he dies a natural death, when he goes beyond the jurisdiction, when there is a prosecution and an acquittal from collusion or carelessness by some prosecutor other than the party injured? All these cases create great difficulties to my mind in the application of this alleged law, and go a long way to justify Mr. Justice Blackburn's doubt. Still, after the continued expression of opinion, and the cases of *Ex parte Elliott* and *Wellock*

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v. *Constantine*, I should hesitate to say that there is no practical law as alleged by the respondent.”

It is clear, from *Wells v. Abrahams* (g), that a judge cannot refuse to try an action because the evidence at the trial tends to shew that the defendant has committed a felony in connection with the subject-matter of the action. Again, a statement of claim is not demurrable on the ground that it shews the cause of action to be a felony for which the felon has not been prosecuted (h), whether the action be brought against the felon or against another, e.g., his master. If the Court has power to strike out a statement of claim, or part of one, which shews on its face that it is sought to make the defendant liable civilly for a felony for which he has not been prosecuted, it is at all events clear that this cannot be done where the felony has not been committed upon or against the plaintiff. Thus, in *Appleby v. Franklin* (i), a paragraph of the statement of claim in an action for seduction alleged that the defendant administered noxious drugs to the plaintiff's daughter for an unlawful purpose, and the Court refused to strike out the paragraph, the plaintiff not being the person upon whom the felony was committed, and so having no duty to prosecute. But a statement of claim which shews that the tort complained of is a felony committed upon or against the plaintiff may, it would seem, be struck out (k). If the felon become bankrupt, assuming that the person upon or against whom the felony has been committed cannot prove in the bankruptcy in respect thereof until after a prosecution, yet should he also become bankrupt, the disability will not extend to his trustee, who represents his creditors (l). There are two other authorities which may be usefully referred to on this subject generally,

(g) L. R. 7 Q. B. 554.

(h) *Rooke v. D'Arigdor*, 10 Q. B. D. 412; *Osborn v. Gillett*, L. R. 8 Ex. 88.

(i) 17 Q. B. D. 93; see R. S. C. Ord. xix. r. 27.

(k) *Appleby v. Franklin*, 17 Q. B. D. 93.

(l) *Ex parte Bull, In re Shepherd*, 10 Ch. D. 667; see *post*, p. 24.

namely, *Ex parte Leslie*, *In re Guerrier* (m), and *Midland Insurance Company v. Smith* (n), where the cases are reviewed by the late Mr. Justice Watkin Williams. On the whole, from a perusal of the authorities referred to, one may come to the conclusion that if the old rule of law under discussion still exists, it is difficult for a defendant to avail himself of it, except perhaps by applying to strike out a statement of claim complaining of a tort which by the statement appears to be a felony committed upon or against the plaintiff (o).

Effect of Death on Torts.—Let us next consider how a right of action for a tort may be affected by the death either of the party injured or of the tort-feasor. It was a principle of the common law that if an injury was done either to the person or property of another, for which *damages* only could be recovered in satisfaction, the action died with the person *to* whom or *by* whom the wrong was done. In other words, where the action was for a tort done to the person or property of another, the rule was “*Actio personalis moritur cum personâ*” (p). And the rule still exists in cases not falling within some one of the following exceptions. Thus the parties to an action for a tort agreed that the action should be referred to arbitration, and that if before the making of the award either of the parties should die, the award should be delivered to his personal representative. After the hearing, and before the award was made, the plaintiff died, and his executors took up the award, but it was held that the cause of action died with the plaintiff, and that the stipulation as to the delivery of the award to the respective personal representatives was futile (q). The first modification of the rule was made by 4 Edw. III. c. 7, which runs as follows:—
 “Whereas in times past executors have not had actions for a trespass done to their testators, as of the goods

4 Edw. III.
c. 7.

(m) 20 Ch. D. 131.

(n) 6 Q. B. D. 561.

(o) *Appleby v. Franklin*, *supra*.

(p) See Williams on Executors, 9th ed. p. 697.

(q) *Bowker v. Evans*, 15 Q. B. D. 565.

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and chattels of the same testators carried away in their life, and so such trespasses have hitherto remained unpunished ; it is enacted, that the executors in such cases shall have an action against the trespassers, and recover their damages in like manner as they, whose executors they be, would have had if they were in life."

This was followed by the 25 Edw. III. stat. 5, which extended to the executors of executors the remedy given to executors by the former Act. Administrators have also been held to come within its equity (*r*). This Act of 4 Edw. III. c. 7, being remedial, has always been expounded liberally, and so, as Mr. Justice Williams puts it, "an executor or administrator shall now have the same action for any injury done to the *personal estate* of the deceased, in his lifetime, *whereby it has become less beneficial to the executor or administrator*, as the deceased himself might have had, whatever the form of the action may be" (*s*).

Where injury
done to free-
hold of person
who subse-
quently dies.

The statute 4 Edw. III. did not, however, give a right of action for injuries done to the *freehold* or to the *person* of the testator or intestate ; but, as will presently be seen, later statutes to some extent remedied this. The first of these, 3 & 4 Will. IV. c. 42, after reciting in s. 2 that there is no remedy provided by law for injuries to the real estate of any person deceased, committed in his lifetime, enacts (s. 2) that "an action of trespass, or trespass on the case, as the case may be, may be maintained by the executors or administrators of any person deceased for any injury to the real estate of such person, committed in his lifetime, for which an action might have been maintained by such person, so as such injury shall have been committed within six calendar months before the death of such deceased person, and provided such

(*r*) *Tharpe v. Stallwood*, 5 M. & G. 760.

(*s*) Williams on Executors, 9th ed. p. 698.

action shall be brought within one year after the death of such person; and the damages, when recovered, shall be part of the personal estate of such person" (t).

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Another statute, 9 & 10 Vict. c. 93, commonly known as Lord Campbell's Act, gives a right of action for injuries to the person in cases where those injuries have resulted in the death of the person injured. It enacts that, "whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony." An action brought under this Act is to be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and it is left to the jury to divide any damages that they may give in such manner as they may think proper. The word "parent" in the Act includes father and mother, grandfather and grandmother, stepfather and stepmother, whilst "child" includes son and daughter, grandson and granddaughter, stepson and stepdaughter (s. 5), but not an illegitimate child (u).

Lord Campbell's Act.

As to the amount of damages recoverable in actions under this statute, it has been held that the measure of damages is the pecuniary loss which the persons on whose behalf the action has been brought have sustained by the death of the deceased; but the jury are not to give damages for the pain and suffering

(t) As to equitable remedies surviving to an heir or devisee, see *Jones v. Simes*, 43 Ch. D. 607.

(u) *Dickinson v. North-Eastern Railway Company*, 2 H. & C. 735.

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endured by him, nor for the mental anguish felt by his family, nor for the funeral or mourning expenses (*c*). Not only may damages be given for the actual pecuniary loss sustained, but the reasonable expectation of pecuniary advantage from the prolongation of the life which has been brought to an end by the wrongful act, neglect, or default, is to be taken into account (*y*).

An action under this Act must be commenced within twelve calendar months after the death of the deceased, and the plaintiff must, with his statement of claim, deliver to the defendant full particulars of the person or persons on whose behalf the action is brought, and the nature of the claim in respect of which damages are sought to be recovered (ss. 3, 4).

If there should be no executor or administrator, or if no action shall have been brought by the executor or administrator within six months after the date of the death, then, by a later Act (27 & 28 Vict. c. 95), the action may be brought by and in the name of the persons for whose benefit such action would have been if it had been brought in the name of the executor or administrator.

Lord Campbell's Act, strictly speaking, may be said to give a new cause of action, because the action is given in substance, not to the person representing in point of estate the deceased (who would naturally represent him as to all his own rights of action which could survive), but to certain members of his family; and not only so, but the action is not one which the deceased could have brought if he had survived the injury, for death is essentially the cause of action (*z*). But though this be so, yet if the deceased has in his lifetime

(*x*) *Franklin v. South-Eastern Railway Company*, 3 H. & N. 211; *Dalton v. South-Eastern Railway Company*, 4 C. B. N. S. 296; *Blake v. Midland Railway Company*, 18 Q. B. 93.

(*y*) *Pynn v. Great Northern Railway Company*, 2 B. & S. 759; 4 B. & S. 396.

(*z*) *Seward v. "Fera Cruz,"* 10 App. Cas. 59.

accepted a sum of money from the wrongdoer in full satisfaction and discharge of his claim for the injuries which caused his death, or has otherwise put it out of his power to sue, his representatives or family will have no right to bring an action under Lord Campbell's Act (*a*).

Again, it will be seen hereafter that in cases coming under the Employers' Liability Act, 1880, or the Workmen's (Compensation for Accidents) Act, 1897, proceedings may be taken in respect of personal injuries which result in a workman's death (*b*).

The rule of law, "*Actio personalis moritur cum personâ*," does not apply to breaches of contractual or statutory (*c*) duty which have caused loss to the personal estate of a deceased person, but it applies to torts and to breaches of contract (*d*) which have not caused such loss (*e*): Thus, an action brought by an administrator for a breach of a promise of marriage to the intestate was held not maintainable, as no special damage to the personal estate of the intestate was alleged (*f*). And, conversely, such an action will not lie against the personal representatives of a deceased promisor, unless special damage be alleged, and in that case it will be confined to the claim for such special damage (*g*). It need hardly be mentioned that in actions for breach of promise of marriage vindictive and exemplary damages are often given as a solatium for the wounded personal feelings of the plaintiff (*h*).

"*Actio personalis moritur cum personâ*": Application of maxim where wrong arises *ex contractu*.

(*a*) *Read v. Great Eastern Railway Company*, L. R. 3 Q. B. 555; *Griffiths v. Dudley*, 9 Q. B. D. 357 (see *post*, Chap. X.); *cf. Blake v. Midland Railway Company*, 18 Q. B. 93. As to Scotland, see *Wood v. Gray*, (1892) App. Cas. 576.

(*b*) See *post*, pp. 226, 233.

(*c*) *Peebles v. Oswaldtwistle Urban District Council*, (1896) 2 Q. B. 159. See S. C. (1897) 1 Q. B. 625.

(*d*) Express or implied, *e.g.*, an implied contract by a solicitor or surgeon to use reasonable professional skill and diligence. See *Chamberlain v. Williamson*, *infra*, at p. 415.

(*e*) See *Williams on Executors*, 9th ed. p. 709.

(*f*) *Chamberlain v. Williamson*, 2 M. & S. 408.

(*g*) *Finlay v. Chirney*, 20 Q. B. D. 494.

(*h*) *Chamberlain v. Williamson*, *ubi supra*.

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There may be two actions where there has been a breach of contract.

Where damage to the personal estate of a deceased person resulting from a breach of *contract* can be shewn, an executor or administrator may have two actions—one in respect of that damage, and the other under Lord Campbell's Act, for the pecuniary loss caused to the family of the deceased by reason of his death. Thus, in *Bradshaw v. Lancashire and Yorkshire Railway Company* (i), where a passenger on a railway was injured by the company's negligence, and, after an interval, died in consequence of the injury, it was held that his executrix might recover, in an action for breach of contract (to carry with due care) against the company, the damage to his personal estate arising in his lifetime from medical expenses and loss occasioned by his inability to attend to business. This decision, though questioned, was followed in *Leggott v. Great Northern Railway* (k), where the deceased, a season-ticket holder on the defendants' railway, was killed by their negligence.

But not where there has been a mere personal tort.

In each of the cases just referred to, the duty for breach of which the action was brought arose out of contract, and the action was in substance for breach of contract to use due care towards the passenger. In a later case (l), the plaintiff sued as the administratrix of her husband, who, whilst crossing the defendants' railway at a level crossing, was, through the negligence of the defendants, run over by an engine, and sustained personal injuries which prevented him from following his occupation and earning wages, and caused him to incur expenses for medical attendance and nursing, whereby his personal estate was diminished in value. A demurrer to the statement of claim was allowed by a Divisional Court, who, pointing out that the action was not in any way founded on contract, held that the maxim "*Actio personalis moritur cum personâ*" applied, as the tort complained of was an injury to the *person*

(i) L. R. 10 C. P. 189.

(k) 1 Q. B. D. 599; see also *Daly v. Dublin, Wicklow and Wexford Railway Company*, 30 L. R. 1r. 514.

(l) *Pulling v. Great Eastern Railway Company*, 9 Q. B. D. 110.

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arising from the defendant's negligence, and there was no authority for the proposition that, because in consequence of such injury the person injured is put to expense, the case could be brought within the category of cases to which the statute of Edward III. applies. The earlier case of *Twycross v. Grant* (m) was referred to, where Brett, L.J., says: "Wherever a breach of contract or a tort has been committed in the lifetime of a testator, his executor is entitled to maintain an action, if it is shewn upon the face of the proceedings that an injury has accrued to the personal estate." As to this, Denman, J., in *Pulling v. Great Eastern Railway Company*, *ubi supra*, said: "Some of the expressions used by the judges in the case of *Twycross v. Grant*, seem no doubt to go to considerable lengths, but those expressions must be construed with reference to the cause of action in that case," which was a fraudulent suppression of certain contracts in a prospectus issued by the promoters of a company, and not a mere *personal* tort.

In a recent case (n) the distinction between a mere personal tort and one which causes damage to the deceased plaintiff's personal estate stands out very clearly.

In this case the plaintiff was a wine merchant, the registered proprietor of a trade-mark, and a dealer in a brand of champagne introduced by himself, which was known as the "Delmonico" champagne. The defendants published a statement to the effect that wine advertised as the "Delmonico" champagne could not be the wine it was represented to be, as no champagne of that description was genuine unless the name of Messrs. Delbeck & Co. was on the labels. The plaintiff brought an action for libel and for damage to his trade or business occasioned by the publication of such libel, and died after the commencement of the action. On the continuance of the action by

(m) 4 C. P. D. 40.

(n) *Hatchard v. Mège and others*, 18 Q. B. D. 771.

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the personal representative of the deceased, it was held that, so far as the action was for defamation, either of private character or of a person in relation to his trade, it came to an end on the death of the plaintiff; but that so far as the action was for the publication of a false and malicious statement, causing damage to the plaintiff's personal estate—*i.e.*, to the trade-mark or brand under which the champagne was sold—it could be continued by the personal representative (*o*).

Action *against*
representa-
tives of de-
ceased
persons.

We have already dealt with 3 & 4 Will. IV. c. 42, s. 2, so far as it allows actions to be brought by the executors or administrators of a deceased person for injuries done to his real estate before his death. The same section allows actions to be brought *against* the executors or administrators of a deceased person who has committed in his lifetime an injury either against the real or the personal estate of another person. It enacts that "an action of trespass, or trespass on the case, as the case may be, may be maintained against the executors or administrators of any person deceased for any wrong committed by him in his lifetime to another in respect of his property, real or personal, so as such injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person; and the damages to be recovered in such action shall be payable in like order of administration as the simple contract debts of such person" (*p*).

In a very recent case a person more than six months before he died completed a building which obstructed the plaintiff's ancient lights: an action brought by

(*o*) See also *Oakey v. Dalton*, 35 Ch. D. 700.

(*p*) See *Woodhouse v. Walker*, 5 Q. B. D. 404 (action for permissive waste against executor of deceased tenant for life who was bound to repair by the instrument creating the estate: see *post*, p. 92).

the plaintiff against the administrators of such person, within six months of the death, was held maintainable, the obstruction being a continuing wrong existing at the date of the death (*q*).

If the testator or intestate, against whom an action has been brought for wrongs committed against the real or personal property of another, should die during the pendency of the action, then the action cannot be revived against his representatives unless the wrongs were committed within six calendar months before the death of the deceased. Thus, in *Kirk v. Todd* (*r*) the plaintiff brought his action for damages and an injunction against the firm of Todd & Co. for fouling a certain stream which flowed by the plaintiff's premises. The firm consisted of Todd alone, who died more than six months after the commencement of the action, and the action was continued against his executors. Vice-Chancellor Bacon dismissed the action, and the Court of Appeal upheld this decision, Jessel, M.R., saying: "This was an action on a simple tort. It did not appear that the defendant *had got any benefit* by fouling the plaintiff's stream; he had only injured the plaintiff. As I understand the rule at common law, it was this—you could not sue executors for a wrong committed by their testator for which you could only recover unliquidated damages. That rule has never been altered, except by the Act 3 & 4 Will. IV. c. 42, which allowed the executors to be sued in certain cases, but with the limitation that the injury must have been committed not more than six months before the death of the testator. That was not so here; therefore the statute did not apply, and the rule of the common law remained in its simplicity" (*s*).

(*q*) *Jenks v. Clifden*, (1897) 1 Ch. 694.

(*r*) 21 Ch. D. 484.

(*s*) *Ibid.* p. 488. If the nuisance were a continuing one existing at the date of the death, might not the plaintiff have maintained an action brought against the executors? See *Jenks v. Clifden*, *ubi supra*.

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Taking the converse case to *Twyecross v. Grant*, *supra*, it is submitted that an action would lie *against* the executor of a deceased promoter in respect of a fraudulent omission or statement in a prospectus of a company in which the plaintiff was induced to take shares to his loss, provided that the "injury" was committed within six months before the death and the action is brought within the time prescribed by 3 & 4 Will. IV. c. 42, s. 2 (t).

Actions, not
for a tort,
but for the
recovery of
property.

Apart, however, from the statute 3 & 4 Will. IV. c. 42, a remedy for a wrongful act can be pursued against the estate of a deceased person by whom the act has been committed, when *property, or the proceeds of property*, belonging to another have been appropriated by the deceased person; in other words, the action in such cases, though arising out of a wrongful act, does not die with the person. But hereon a very nice question arises—namely, whether the principle thus enunciated is limited to cases in which property, or the proceeds of property, have been appropriated by the deceased person, or whether it applies to a case in which the deceased person has derived any other benefit from his wrongdoing than property, or the proceeds of property: whether, for example, it applies to a case in which the benefit derived has not been in the form of an actual acquisition of property, but of a saving of expenditure which must otherwise have been incurred by the wrongdoer; where, for instance, the deceased wrongfully used, for the carriage of minerals, certain roads and passages under another person's farm, and so saved himself expenditure which he would otherwise have incurred: see per Baggallay, L.J., *diss.*, in *Phillips v. Homfray (u)*. In

(t) *Cf.*, however, *Peck v. Gurney*, L. R. 6 H. of L. 377, at p. 393, where the reason given for the dismissal of an action against the executor of a deceased promoter was that "his estate derived no benefit from the misrepresentation." It is submitted that this is unnecessary where the injury is committed and the action brought by an allottee within the times mentioned in the above section—a state of facts which did not exist in *Peck v. Gurney*.

(u) 24 Ch. D. 439.

the case just cited the majority of the Court of Appeal (Cotton and Bowen, L.JJ.) held that "property, or the proceeds or value, which, in the lifetime of the wrongdoer, could have been recovered from him, can be traced after his death to his assets, and recaptured by the rightful owner there (x). But it is not every wrongful act by which a wrongdoer indirectly benefits that falls under this head, if the benefit does not consist in the acquisition of property, or its proceeds or value. Where there is nothing among the assets of the deceased that in law or in equity belongs to the plaintiff, and the damages which have been done to him are unliquidated and uncertain, the executors of a wrongdoer cannot be sued merely because it was worth the wrongdoer's while to commit the act which is complained of, and an indirect benefit may have been reaped thereby. Two illustrations can be given of the above distinction with regard to the liability of executors. The produce, proceeds, or value of waste, equitable or legal, committed by a tenant for life, can be followed into the hands of his executors, and retaken from them. If he has wrongly cut timber, the timber, or its proceeds or value, can be followed. But no action for waste—permissive or voluntary—as such, lies against the executors of a tenant for life. By non-repairing a house, or by ploughing up ancient meadow, the tenant for life may have indirectly benefited himself or saved his own pocket. But neither law nor equity recognises, in this indirect benefit which he may have received, any ground for proceedings against his executors. A second illustration may be given of the distinction we have referred to. The rents or the produce or profits of land, which had wrongly been received by a person other than the rightful owner (as a rule, and subject to certain exceptions that we need not now discuss),

(x) Interest at 4 per cent. from the date of death may also be recovered: see *Phillips v. Homfray*, (1892) 1 Ch. 465 (a later stage of S. C.).

CHAP. I.

may be pursued by the rightful owner, and recovered from the wrongdoer, or, if he is dead, from his estate. But there is a sense in which the term 'profits' is used, with reference to land, to represent the unliquidated damages recoverable in respect of a trespass, as when an action for mesne profits is maintained to recover, not the rents or produce of land or their natural equivalent, but compensation for the bare possession wrongfully taken and held of the land itself. An action for mesne profits in this narrower sense will not lie at common law and apart from statute against executors, and no account would be decreed in equity, except in a case where the profits were either property, or the produce or profits or value of property, actually received. This line of demarcation has drawn itself in conformity with the classification of forms of action known to the English law. As long as the maxim 'Actio personalis moritur cum personâ' is preserved by the law of this country, the line drawn is neither inconvenient nor unreasonable. If every wrongful act which was attended consequentially and indirectly with advantage to the wrongdoer, or his pocket, were to warrant an action against executors, it would be impossible to know when executors were liable or not, and the maxim would in fact become a mere source of litigation." Baggallay, L.J., was unable to agree with the learned Lords Justices who drew the fine distinctions indicated in the above extract from their joint judgment, and who held that the executors of the deceased were not liable for the indirect benefit received by his estate by reason of the wrongful use by him in his lifetime of certain roads and passages under the plaintiff's land (y).

Effect of Bankruptcy on Torts.—The bankruptcy of the tortfeasor, or of the person against whom the

(y) An appeal to the H. of L. against the judgment was dismissed as being out of time; 11 App. Cas. 466: see also S. C. (1892) 1 Ch. 465.

tort has been committed, may next be considered. If the tortfeasor should become bankrupt, then, as a rule, a proof or claim in respect of the tort cannot be made against his estate, for by s. 37 of the Bankruptcy Act, 1883, "Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise, or breach of trust, shall not be provable in bankruptcy." As such demands are not provable, the bankrupt will of course remain liable in respect of them, notwithstanding his discharge (s. 30). If, however, the damages recoverable for a tort become liquidated by a judgment before the date of the receiving order, they will be provable, but they do not become liquidated by a verdict only (z). Again, though the infringement of a patent is no doubt a tort, still as the amount of profits recoverable by the patentee for such infringement is not so much in the nature of damages as of money had and received to his use, such amount may be proved for in the bankruptcy of the infringer (a).

If the person against whom the tort has been committed should become bankrupt, then the property that will pass to his trustee in bankruptcy will include (*inter alia*) "all such property as may belong to, or be vested in, the bankrupt, at the commencement of the bankruptcy, or may be acquired by, or devolve on, him before his discharge": Bankruptcy Act, 1883, s. 44. The definition of property given by s. 168 is very wide. and a trustee in bankruptcy may, as a rule, bring an action for a breach of contract or for a tort causing damage to the estate. But a right of action for a tort of a personal nature, such as a libel, slander, or assault, will not pass to the trustee in bankruptcy. For in these cases the injury to the bankrupt's person or feelings is the primary and essential cause of action (b).

(z) *In re Newman, Ex parte Brooke*, 3 Ch. D. 494.

(a) *Watson v. Holliday*, 20 Ch. D. 780; affirmed 31 W. R. 536.

(b) See *Beckham v. Drake*, 8 M. & W. 846; 11 M. & W. 315; 2 H. of L. Cas. 579.

CHAP. I.

Torts committed Abroad.—Now suppose that a tort

has been committed abroad, can an action in respect of it be brought in this country by the injured party? The well-known case of *Mostyn v. Fabrigas* (c) which is to be found in Smith's Leading Cases, shews that under certain circumstances such an action may be brought. The first condition to the right of bringing the action is that the act must not have been justifiable by the law of the place where it was done. If the defendant would not be liable abroad, civilly or criminally, for the act, the plaintiff cannot maintain an action here in respect of it (d). To give a recent example. In *The M. Mocham* (e), an English company, possessed of a pier in a port in Spain, instituted a cause of damage against an English ship for negligently damaging the pier. The shipowners by their answer pleaded that, by the law of Spain, the master and mariners of the ship, and not the owners, were liable for negligent navigation, and it was held, reversing the decision of the judge of the Probate, Divorce, and Admiralty Division, that the case was governed by the law of Spain, and that that part of their answer ought not to be struck out. *Phillips v. Eyre* (f) may also be referred to on this point. There, an action for assault and false imprisonment in Jamaica, was brought against the Governor of Jamaica, and it was held that an Act of Indemnity, retrospective in its nature, passed by the Legislature of the island, and assented to by the Crown, for acts done in good faith after the proclamation of martial law in the suppression of a rebellion, had effect outside the limits of Jamaica, so as to prevent an action being brought in England.

*Mostyn v.
Fabrigas.*

(1) The wrong
must not
be justifiable
abroad.

(2) The wrong
must be
actionable
according to
English law.

In the second place, it is essential to the bringing of an action in this country for a tort committed abroad, that the act complained of must be a tort according to

(c) 1 Cowp. 161; 1 Sm. L. C. 572.

(d) *Machado v. Fontes*, (1897) 2 Q. B. 231.

(e) 1 P. D. 43, 107.

(f) L. R. 4 Q. B. 225; 6 Q. B. 1.

English law. This may be illustrated by the case of *The Halley* (g), where proceedings were instituted, in the then High Court of Admiralty in England, by the owners of a Norwegian barque against a British steamer for damages for a collision which took place in Belgian waters by the alleged negligent and improper navigation of the vessel. The owner of the steamship pleaded that the vessel was in charge of a pilot whom they were compelled by the Belgian law to employ. The owners of the barque replied that by the Belgian law it is provided that the owners of a ship which has done damage to another by collision are liable for the damage, notwithstanding that the vessel was in charge of a compulsory pilot, and although the damage was occasioned by his negligence or want of skill. The Privy Council, however, held that an English Court will not enforce a foreign municipal law so as to give a remedy in the shape of damages in respect of an act which according to its own principles imposes no liability on the person from whom the damages are claimed.

It was formerly a question whether there is a third condition to the right of bringing in the United Kingdom an action for a tort committed abroad, and that is, that the tort should be to the person or to personal property, and not to real property. In *The M. Moxham* (h) the point was left undecided, owing to an agreement of the parties that objection to the jurisdiction on this ground should not be set up. But it has now been held that, notwithstanding the abolition of local venues, the Courts of this country have no jurisdiction to try an action relating to land situate in a foreign country against a defendant within the jurisdiction, whether the remedy sought be a declaration of title to such land, or an injunction

(3) The wrong must not be in respect of land situate abroad.

(g) L. R. 2 P. C. 193.

(h) *Ubi supra*; see and cf. *Whitaker v. Forbes*, 1 C. P. D. 51; *In re Hawthorne, Graham v. Masscy*, 23 Ch. D. 743.

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Where the defendant to an action for a tort committed abroad is out of the jurisdiction, then, before leave can be obtained to serve a writ of summons on him, it must be shewn that he is domiciled or ordinarily resident within the jurisdiction (*k*).

(*i*) *British South Africa Company v. Companhia de Moçambique*, (1893) App. Cas. 602, reversing *Companhia de Moçambique v. British South Africa Company*, (1892) 2 Q. B. 358 ; see also R. S. C. Ord. xxxvi. r. 1, abolishing local venues.

(*k*) See R. S. C. Ord. xi. r. 1 (*c*).

CHAPTER II.

TORTS TO THE PERSON.

CHAP. II.

Rights of personal security and liberty consist in the right to the enjoyment of life, limbs, and bodily health, and in a man's right to move his body from place to place at his pleasure, so far as he can do so consistently with his legal obligations (*a*). These rights, however, are often infringed by assault, battery, false imprisonment, or nuisances to health or comfort, which we shall treat in their order.

Assault.—This is an attempt or offer to beat a person without touching him; as if one lifts up his cane or his fist in a threatening manner at another, or strikes at him but misses him. For such inchoate violence an action may be brought in which damages may be recovered (see Blackstone, Commentaries, vol. iii. p. 120). But it is not every threat where there is no actual personal violence that constitutes an assault; there must in all cases be the means of carrying the threat into effect (*b*). There must, in fact, be a threat of violence exhibiting an intention to assault and a present ability to carry the threat into execution (*c*). If, for instance, a sword is flourished at such a distance that it would be impossible to hurt any person, it would not be an assault (*d*). Again, where a man put his hand upon his sword and said, "If it were not assize time, I would not take such language from you," there was

(*a*) Addison on Torts, p. 3.

(*b*) Per Tindal, C.J., *Stephens v. Myers*, 4 C. & P. 349.

(*c*) See *Read v. Coker*, 13 C. B. 850, at p. 860.

(*d*) See *Allsop v. Allsop*, 5 H. & N. 534; see also *Cobbett v. Grey*, 4 Ex. 729, at p. 744.

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no assault, as his words shewed that he did not mean to strike (*e*).

Battery.—Any injury whatsoever, be it never so small, being actually done to the person of a man in an angry, revengeful, rude, or insolent manner, as by spitting in his face, or in any way touching him in anger, or violently jostling him out of the way, would amount to a battery in the eye of the law (*f*). In practice, it may be observed that the term “battery” is now seldom used, “assault” being often used as including a battery. The following are a few instances of batteries:—Wrongfully cutting off a person’s hair without his consent (*g*) ; striking a person’s horse so that it runs away and throws him to the ground (*h*) ; by threats or violence causing a female to be medically examined against her will (*i*). But every laying on of hands is not a battery : for the party’s intention must be considered ; as people will sometimes, by way of joke or in friendship, clap a man on the back (*k*). And so, too, there is no battery where one touches another for the purpose of calling his attention to something (*l*). And where the act alleged to be a battery was neither intentional nor the result of negligence, an action will not lie. Thus, A. fired at a bird, and a pellet from his gun glanced off the branch of a tree and hit B. in the eye : A. did not intend this result, and the jury found that he was not negligent : held, that an action could not be maintained by B. against A. (*m*). Again, a person cannot recover damages for a battery where the act complained of was done by his own permission (*n*), though

(*e*) *Tuberville v. Savage*, 1 Mod. 3.

(*f*) See Hawkins, Pleas of the Crown, vol. i. p. 110 ; see also *Rowlings v. Till*, 3 M. & W. 28.

(*g*) *Forde v. Skinner*, 4 C. & P. 239.

(*h*) *Dodwell v. Burford*, 1 Mod. 24.

(*i*) *Latter v. Braddell*, 50 L. J. Q. B. 166, 448.

(*k*) *Williams v. Jones*, Lee, Cas. temp. Hard. 298.

(*l*) *Coward v. Baddeley*, 28 L. J. Ex. 260.

(*m*) *Stanley v. Powell*, (1891) 1 Q. B. 86 : see also *Peacock v. Nicholson*, 11 T. L. R. 225.

(*n*) *Christopherson v. Bare*, 11 Q. B. 473.

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it may be that criminal proceedings may be taken for it if the act is injurious to the public. A prize-fight, for instance, is illegal, and the parties to it may be prosecuted for batteries (or, to use the more usual word, assaults), upon each other, and every person aiding or abetting therein is also guilty of an assault (o).

Other Defences to an Action for Assault and Battery.—A party assaulted is entitled to defend himself, and on being sued for an assault, may plead *son assault demesne*, or that he acted in self-defence. But “if a man strike another, who does not immediately afterwards resent it, but takes his opportunity, and then some time afterwards falls upon him and beats him, in this case *son assault demesne* is no good plea; neither ought a man in case of a small assault to give a violent or unsuitable return . . . for hitting a man a little blow with a little stick on the shoulder is not a reason for him to draw a sword and cut and hew the other” (p).

Son assault demesne.

Secondly, an assault committed in defending one’s wife or husband, children, parents, or one’s master, is justifiable (q).

Assault committed in defence of wife and others.

Thirdly, a parent may reasonably chastise his child, a schoolmaster his scholar, and a master his apprentice (r). And a master of a ship may similarly in a case of necessity inflict summary punishment upon a member of the crew, or a passenger (s).

Reasonable castigation of children and others.

Fourthly, a minister or other person in the possession of a vestry-room may remove therefrom an intruder (t); churchwardens may remove from a church persons

Removal of intruders and disorderly persons.

(o) See *Regina v. Coney*, 8 Q. B. D. 534.

(p) *Cockroft v. Smith*, 11 Mod. 43.

(q) *Leeverd v. Basille*, 1 Salk. 407; 3 Salk. 46.

(r) See *Hawkins, Pleas of the Crown*, 150; *Winterburn v. Brooks*, 2 C. & K. 16; *Fitzgerald v. Northcote*, 4 F. & F. 656; *Penn v. Ward*, 2 C. M. & R. 338; *Cleary v. Booth*, (1893) 1 Q. B. 465.

(s) See *Lamb v. Burnett*, 1 C. & J. 291; *Aldworth v. Stewart*, 4 F. & F. 957; *Noden v. Johnson*, 16 Q. B. 218.

(t) *Jackson v. Courtenay*, 8 E. & B. 8.

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who interfere or are about to interfere with the decent and proper celebration of divine service (*u*); persons disturbing the proceedings in a court of justice may be removed by direction of the judge (*x*), and disorderly persons may be turned out of a public-house or shop (*y*).

In all such cases, however, it must not be forgotten that there should first be a request to depart, and if that be not complied with no more force than is necessary should be used (*z*).

Assault committed by authority of Government on a foreigner.

Fifthly, where an act injurious to the person or property of some person, who is not at the time of the act a subject of the Queen, is done either by the prior command of her Majesty's Government, or with its subsequent ratification, there can be no redress for it in our Courts against the person who does the act. This being an "Act of State" can only be called in question by war, or by an appeal to the justice of the State itself. This doctrine as to Acts of State only applies to acts which affect foreigners, and there can be no such thing as an Act of State between the Sovereign and her own subjects (*a*).

Assault by order of Parliament.

Sixthly, there is no redress for an act done by the order of either House of Parliament, relating to its own internal concerns, or in the exercise of discipline over its own members (*b*).

Assault committed in defence of property.

Seventhly, an assault may be justified where it is committed in defence of one's property, and is not excessive (*c*).

(*u*) *Hartley v. Cook*, 9 Bing. 728; *Burton v. Henson*, 10 M. & W. 105.

(*x*) *Collier v. Hicks*, 2 B. & Ad. 663.

(*y*) *Webster v. Watts*, 11 Q. B. 311; *Howell v. Jackson*, 6 C. & P. 723; *Timothy v. Simpson*, 6 C. & P. 499.

(*z*) *Dean v. Taylor*, 11 Ex. 68.

(*a*) *Buron v. Denman*, 2 Ex. 167 (trespass); Stephen's Hist. of Crim. Law, vol. ii. p. 65.

(*b*) *Bradlaugh v. Gossett*, 12 Q. B. D. 271: see also *Howard v. Gossett*, 10 Q. B. 359; *Bradlaugh v. Erskine*, 47 L. T. 618.

(*c*) *Weaver v. Bush*, 8 T. R. 78; and see *Holmes v. Bagge*, 1 E. & B. 782.

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Forcible
entry.

If the rightful owner is *in possession* of his land he may by force resist an attempt of another to enter forcibly, but where the other has entered peaceably, the rightful owner in possession should first request him to leave (*d*). But where the rightful owner is *out of possession*, though entitled to it, it is not quite clear, on the authorities, what his rights and liabilities would be should he attempt to regain possession without the aid of the law. There is no doubt that by the statute 5 Rich. II. stat. 1. c. 8, a forcible entry is an indictable offence, and it would appear that "if one enters peaceably, and when he is come in, useth violence, this is a forcible entry" (*e*).

And it has been held that a licence given by a tenant to his landlord to eject him on a specified day, without process of law, is void as contravening the provisions of the statute of Richard (*f*). It is not so clear, however, what rights of action (if any) the person wrongfully in possession may have. But the effect of the authorities, taking them as a whole, would seem to be as follows:—Where a person is wrongfully in possession he can recover no damages for the entry, or for mere eviction (unaccompanied by anything amounting to an assault or other wrong), because the possession is not legally his, and he can recover no damages for the force used in the entry, because, though the statute of Richard II. creates a crime, it gives no civil remedy (*g*). But in respect of independent wrongful acts which are done in the course of, or after, the forcible entry, such as an assault or damage to furniture, a right of action does arise, because the person doing them cannot allege that the acts were lawful, unless justified

(*d*) *Weaver v. Bush*, 8 T. R. 78; *Polkinhorn v. Wright*, 8 Q. B. 197.

(*e*) Viner's Abridgment: Forcible Entry (A); *Eldwick v. Hawkes*, 18 Ch. D. 199.

(*f*) *Eldwick v. Hawkes*, 18 Ch. D. 199.

(*g*) *Pollen v. Brewer*, 7 C. B. N. S. 371; *Beddall v. Maitland*, 17 Ch. D. 174, 189.

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by a lawful entry; and he cannot plead that he has a lawful possession (*h*).

Where proceedings have already been taken for same assault.

Lastly, it is sometimes a good defence to an action for assault and battery, that proceedings in respect of it have been taken before magistrates, and that such proceedings have been dismissed, and a certificate to that effect given to the defendant, or that he has been convicted, and has paid the fine or suffered the punishment meted out to him. This is the effect of 24 & 25 Vict. c. 100, ss. 42—45. The first of these sections enables two justices to deal with a case of common assault or battery; s. 43, with aggravated assaults upon boys under fourteen, or upon females. Then, by s. 44, if the justices, on the hearing of any such case *on the merits*, shall deem the offence not to be proved, or shall find the assault or battery to have been justified, or so trifling as not to merit any punishment, and shall accordingly dismiss the complaint, they are to deliver forthwith—*i.e.*, upon the application of the party entitled, not forthwith upon the dismissal of the complaint (*i*)—a certificate stating the fact of such dismissal to the person against whom the charge of assault was preferred; and by s. 45, if such person shall have obtained such certificate, or, having been convicted, shall have paid the whole amount adjudged to be paid, or shall have suffered the imprisonment with hard labour awarded, “in every such case he shall be released from all further or other proceedings, civil or criminal, for the same cause.”

The granting of the certificate of dismissal above referred to is a ministerial and not a judicial act, and it lies not within the discretion of the justices to refuse

(*h*) See *Beddall v. Maitland*, 17 Ch. D. 174, where Fry, J., relies on *Newton v. Harland*, 1 M. & G. 644; *cf. Scott v. Matthew Brown*, 51 L. T. 746; *Jones v. Foley*, (1891) 1 Q. B. 730. It is right to say that the authority of *Newton v. Harland* has been on more than one occasion questioned; see *Harvey v. Brydges*, 14 M. & W. 437; *Davis v. Burrell*, 10 C. B. 821, at p. 825; *Lowe v. Telford*, 1 App. Cas. 414, at p. 426.

(*i*) *Costar v. Hetherington*, 28 L. J. M. C. 198.

it (*k*). But it can only be granted under s. 44, *supra*, where there has been a hearing on the merits, so that if a prosecutor does not appear, and offers no evidence, a certificate obtained by the person charged will not be a defence to a subsequent action (*l*).

The word "cause" at the end of s. 45 of 24 & 25 Vict. c. 100, does not mean cause of action, but is equivalent to "assault," and so in *Masper and Wife v. Brown* (*m*), where the defendant assaulted the female plaintiff, and for such assault was fined by the justices under the statute, and paid the fine, it was held that an action by the husband in respect of the consequential damage to himself (such as loss of the wife's society, medical expenses, &c.), by reason of the assault on his wife, was barred by the 45th section, and that that section had released the defendant from all further proceedings by any person.

In the previous case of *The Queen v. Morris* (*n*), which was not cited, the Court for Crown Cases Reserved (Kelly, C.B., dissenting) held that a conviction for assault by justices, at the instance of the person assaulted, and imprisonment consequent thereon, are not, either at common law or under s. 45 of 24 & 25 Vict. c. 100, a bar to an indictment for manslaughter of the person assaulted, should he subsequently die from the effects of the assault. There the Court, pointing out that the word "act" was not the word used, interpreted the word "cause" as meaning "accusation" or "charge," and said that the cause for the indictment for manslaughter comprehended more than the cause in the former summons before the justices, for that it comprehended the death of the party assaulted. With reference to these cases,

(*k*) *Hancock v. Somes*, 1 E. & E. 795 (a decision under 9 Geo. IV. c. 31, ss. 27, 28).

(*l*) *Reed v. Nutt*, 24 Q. B. D. 669; see *Reg. v. Miles*, 38 W. R. 334.

(*m*) 1 C. P. D. 97.

(*n*) L. R. 1 C. C. R. 90.

CHAP. II. Stephen, J., says (o) : “ In *Reg. v. Morris* (p), followed in *Masper v. Brown* (q), it was held that these words [in s. 45] mean subsequent proceedings for an assault, and that they do not mean to cover subsequent proceedings for the act constituting the assault.”

A master may be responsible for an act of his servant done in the course of the servant's employment, though it may amount to a crime ; and a release obtained by the servant under the above statute will not discharge the master from civil liability (r).

Where a defendant intends to avail himself of the provisions of the section, he ought to plead it (s).

FALSE IMPRISONMENT.

Definition.—False imprisonment is a restraint on the liberty of a person without lawful cause, either by confinement in a prison or a house or elsewhere, or even by forcibly detaining him in the streets against his will : *Bird v. Jones* (t). The case just cited, however, shows that, to constitute an imprisonment, there must be a total restraint on the liberty of a person for however short a time, and not merely a partial obstruction of his will, whatever inconvenience it may bring on him. “ A prison may have its boundary large or narrow, visible and tangible, or, though real, still in the conception only ; it may itself be movable or fixed, but a boundary it must have, and that boundary the party imprisoned must be prevented from passing ; he must be prevented from leaving that place within the ambit of which the party imprisoning would confine him, except by prison-breach ” : per Coleridge, J., at p. 744. In that case a part of a public highway (Hammersmith Bridge) was appropriated for seats to

(o) Digest of Criminal Law, 3rd ed. p. 183.

(p) *Ubi supra*.

(q) *Ubi supra*.

(r) *Dyer v. Munday*, (1895) 1 Q. B. 742.

(s) R. S. C. Ord. XIX. r. 15 ; *Harding v. King*, 6 C. & P. 427.

(t) 7 Q. B. 742.

view a boat-race on the river, and separated for that purpose from the carriage-way by a temporary fence. The plaintiff desired to enter this part, and was opposed by the defendant; but after a struggle, during which no permanent detention of his person took place, he got into the enclosure. Two policemen were then stationed to prevent, and they prevented, him from passing onwards, but he was allowed to remain where he was or to go back if he chose. Under these circumstances, the Court (*diss.* Denman, C.J.) held, on the grounds above stated, that there was no imprisonment, and that whether the plaintiff had or had not a right to pass along inside the fence.

But if a person manifests his intention to arrest another, actual contact is not always necessary. Thus, "if the bailiff who has a process against one, says to him, when he is on horseback or in a coach, 'You are my prisoner; I have a writ against you,' upon which he submits, turns back or goes with him, though the bailiff never touched him, yet it is an arrest, because he submitted to the process" (*u*).

Justification of Arrest or Imprisonment.—An arrest or imprisonment may be justified if authorised by law or the warrant of a competent tribunal.

Arrests authorised by Statute.—(1) By 5 Geo. IV. c. 83, s. 6, any one may apprehend a person who shall be found offending against that Act, which was passed for the punishment of idle and disorderly persons, and rogues and vagabonds.

(2) By 2 & 3 Vict. c. 47, ss. 63—66, any metropolitan police-constable may arrest, without warrant, *inter alios*, (a) offenders against the Act whose names and residences cannot be obtained, (b) idle and suspicious persons, (c) persons charged with committing an aggravated assault, (d) persons found committing any offence

(*u*) Buller's *Nisi Prius*, adopted by the Court in *Grainger v. Hill*, 4 Bing. N. C. 212; *Warner v. Riddiford*, 4 C. B. N. S. 180.

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punishable either upon indictment or as a misdemeanour upon summary conviction under the Act; and a similar power of arrest is given to the owner of the property on which such persons are found committing the offence, and the servant or agent of such owner.

(3) By 14 & 15 Vict. c. 19, s. 11, any one may apprehend any person who shall be found committing any indictable offence in the night.

(4) By 24 & 25 Vict. c. 96 (Larceny Act), s. 103, persons found committing offences under the Act may be immediately apprehended by any person without a warrant; and by s. 104 a constable may apprehend without warrant any one whom he finds lying or loitering in any place during the night, and whom he has good cause to suspect has committed, or is about to commit, any felony against the Act.

(5) By 24 & 25 Vict. c. 97 (Malicious Injuries to Property Act), s. 61, any person committing any offence against that Act may be apprehended without a warrant by a constable, or the owner of the property, or his servant or agent.

(6) By 35 & 36 Vict. c. 93 (Pawnbrokers' Act), s. 34, a pawnbroker may apprehend any person who does not satisfactorily account for the means whereby he became possessed of an article which he offers in pawn, or who gives false information as to whether the article is his own or not, or as to his name or address, or whom he reasonably suspects is trying to pawn a stolen article.

(7) By 52 & 53 Vict. c. 57 (Regulation of Railways Act, 1889), s. 5, a passenger may be arrested if having failed to produce, or if requested to deliver up, a ticket shewing that his fare is paid, or to pay his fare, he refuses on request by an officer or servant of the railway company to give his name and address (*x*). See

(*x*) See also 8 & 9 Vict. c. 20, s. 103 (repealed in part), ss. 104 and 154. As to tramways, see The Tramways Act, 1870 (33 & 34 Vict. c. 78), ss. 51 and 52. There are a few other statutes, besides those mentioned above, which give a power to arrest.

also 23 & 24 Vict. c. 32, ss. 2, 3, as to arrest of persons making a disturbance in a church, chapel, churchyard, or burial-ground.

Arrests authorised by Common Law.—Any person may arrest one if he sees him committing a breach of the peace, or if he has reasonable grounds to believe that a breach of the peace which has been committed will be renewed (*y*). But a private individual is not justified in arresting another on mere suspicion that he has committed a misdemeanour (*z*). (1) Breach of the peace.

A private individual is not justified in causing the arrest of any person for a felony unless he can shew that a felony has been committed, and that there is a reasonable ground of suspicion against such person, but a constable may arrest a person upon a reasonable ground of suspicion that he has committed a felony, even though none has been committed (*a*). If the grounds are unreasonable, the arrest will be unlawful. And so, if, on a charge of felony made to a constable, it ought to have appeared to him, from the lapse of time or other circumstances, doubtful whether a felony had been committed, and that there was no reason for suspecting the person charged, the constable will be liable for false imprisonment (*b*). But, in general, if one comes to a constable and charges another with felony, the constable is bound to arrest (*b*), and the person who has made the charge, if it be unfounded, may be liable in an action for false imprisonment (*c*). But if a person simply gives certain information to a constable, upon which the constable makes an arrest, such person will not be liable to such an action, even though he should subsequently sign the charge-sheet at the police-station (*d*). (2) Felonies.

(*y*) *Timothy v. Simpson*, 1 C. M. & R. 757; *Price v. Seely*, 10 Cl. & F. 28.

(*z*) *Mathews v. Biddulph*, 4 Scott, N. R. 54; *Fox v. Gaunt*, 3 B. & Ad. 798.

(*a*) *Beckwith v. Philby*, 6 B. & C. 635.

(*b*) *Hogg v. Ward*, 3 H. & N. 417.

(*c*) *Hopkins v. Crowe*, 4 A. & E. 774.

(*d*) *Grinham v. Willey*, 4 H. & N. 496.

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Arrest on Magistrate's Warrant.—Where a constable is armed with the warrant of a magistrate, he will not be liable to an action for making an arrest of the person named therein, even though there be a defect of jurisdiction in the magistrate, unless the constable, after a written demand for a perusal and copy of the warrant, refuse or neglect for six days to comply with such demand (24 Geo. II. c. 44, s. 6). But, whenever a warrant is issued for the arrest of a person for an offence less than felony, it is the duty of the constable to have the warrant in his possession at the time of making the arrest, to be produced if called for (c).

Liability of Judges, Magistrates, and Others.—

“The general rule of law as to actions of trespass against persons having a limited authority . . . is plain and clear. If they do any act *beyond* the limit of their authority, they thereby subject themselves to an action of trespass; but if the act done be *within* the limit of their authority, although it may be done through an erroneous or mistaken judgment, they are not thereby liable to such action” (f). But a judge or magistrate is not liable for exceeding his jurisdiction, unless he knew or had the means of knowing facts which would shew him such excess of jurisdiction (g). Where, however, he exceeds his jurisdiction through a misapprehension, not of fact, but of law, he is liable (h).

Next, as to the liability of parties or their solicitors who initiate proceedings under which a person is arrested, *e.g.*, attached for contempt, the law seems to be shortly as follows:—If the proceedings are subse-

(c) *Codd v. Cabe*, 1 Ex. D. 352.

(f) *Doswell v. Incey*, 1 B. & C. 163, at p. 169. A revising barrister has statutory jurisdiction to expel from his Court any person who interrupts the business of his Court, or disobeys his lawful orders; but this will not justify his expulsion of a person who, in his opinion, at the previous year's Court, wrongfully withheld certain material documents: *Willis v. MacLachlan*, 1 Ex. D. 376.

(g) *Pike v. Carter*, 3 Bing. 78; *Culder v. Hallett*, 3 Moo. P. C. 23.

(h) *Houlden v. Smith*, 14 Q. B. 841.

quently set aside as void, or for irregularity, by reason, for instance, that they were taken in violation of good faith, or that material facts were concealed from the Court, the solicitor who has taken them, as well as his client, may be liable to an action for false imprisonment. But they will not be so liable if the order or judgment of the Court be set aside or reversed on the ground of error (*i*).

A sheriff, who is a ministerial officer, may act under a writ or process which is irregular, or erroneous, till it be set aside (*k*); but if it be altogether void, or invalid, he may be liable (*l*).

Again, a governor of a prison may safely obey a warrant of imprisonment, valid on its face and issued by a court of competent jurisdiction (*m*).

Contempt of Court.—A Superior court of record may fine or imprison persons for contempt of Court, but the jurisdiction in this respect of a County Court is practically limited to cases where the contempt is committed in face of the Court (*n*). By the County Courts Act, 1888, if a person wilfully insults the judge, or any juror, witness or officer of the Court, during his sitting or attendance in Court, or in going to or returning from the Court, or wilfully interrupts the proceedings in Court, or misbehaves himself therein, he may by order of the judge be fined or imprisoned (*o*).

NUISANCES TO HEALTH OR COMFORT.

Actionable nuisances may be of various kinds, such, for instance, as those which affect one's bodily health or

(*i*) See *Parsons v. Lloyd*, 2 Wm. Bl. 845; *Barker v. Brabton*, 2 Wm. Bl. 866; *Green v. Elgie*, 5 Q. B. 99; *Cooper v. Harding*, 7 Q. B. 928; *Collett v. Foster*, 2 H. & N. 356; *Williams v. Smith*, 14 C. B. N.S. 596; *Smith v. Sydney*, L. R. 5 Q. B. 203.

(*k*) *Cotter v. Michell*, 3 Lev. 20; *Prentice v. Harrison*, 4 Q. B. 852.

(*l*) *Hooper v. Lane*, 10 Q. B. 546.

(*m*) *Henderson v. Preston*, 21 Q. B. D. 362.

(*n*) *Reg. v. Lefroy*, L. R. 8 Q. B. 134; *Reg. v. Judge of Brompton County Court*, (1893) 2 Q. B. 195.

(*o*) 51 & 52 Vict. c. 43, s. 162. As to assaults on officers of the Court, and rescue of goods levied, see s. 48; *Lewis v. Owen*, (1894) 1 Q. B. 102.

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comfort; public nuisances, such as the obstruction of a highway, which cause special damage to an individual (*p*); and nuisances which have an injurious effect on one's property, which will be discussed hereafter (*q*). As to the first, not everything which causes annoyance is actionable. One has to put this question: "Ought this inconvenience to be considered in fact as more than fanciful, more than one of mere delicacy or fastidiousness, as an inconvenience materially interfering with the ordinary comfort, physically, of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people" (*r*). The question is thus in part one of fact and one depending on all the circumstances and on the reasonable discretion of the tribunal which has to decide it. What would be a nuisance in Belgrave Square would not necessarily be a nuisance in Whitechapel, where the conditions of life are different (*s*); one has to a certain extent to adapt himself to his surroundings. A., a teacher of music in a London house separated by a rather unsubstantial party wall from a house occupied by B., will not be restrained from reasonably using his house, at seasonable hours, for teaching and practice; but if B., in retaliation and to annoy A., produces unmusical and discordant noises, he may be restrained by injunction (*t*). And so may C., the proprietor of a merry-go-round, who produces by the noise of his steam-organ a maddening effect on D., who lives in a neighbouring dwelling-house: and if, instead of C., there were E. and F., each emitting feebler sounds from his hand-organ, but contributing his quantum of noise till the whole amounts to a nuisance, they also may be restrained (*u*).

(*p*) See *ante*, p. 6.

(*q*) See *post*, Chap. V.

(*r*) See *Falter v. Selfe*, 4 De G. & Sm. 322.

(*s*) See *Hussey v. Bowley*, 11 T. L. R. 221.

(*t*) *Christie v. Davey*, (1893) 1 Ch. 316.

Lambton v. M'Alister, *Lambton v. Cox*, (1894) 3 Ch. 163.

Where two or more independent tortfeasors commit a nuisance, it is possible, but not certain, that they may be made co-defendants in one action, if an injunction is the only remedy sought against them: but it is clear that where damages are claimed against them they cannot be sued in one action (*x*).

Instead of bringing an action for an injunction or damages a person aggrieved may, as we shall see, in certain cases, abate a nuisance (*y*); and the right to abate may exist, and be exercised, even in cases where the Court has refused an injunction (*z*). If a case for an injunction be made out, yet as a general rule damages will be given instead of an injunction, if (1) the injury to the plaintiff's legal rights is small, and (2) is one capable of being estimated in money, and (3) is one which can be adequately compensated by a small sum of money, and (4) the case is one in which it would be oppressive to the defendant to grant an injunction (*a*).

(*x*) See and cf. Ord. xvi. r. 4; *Thorpe v. Brumfitt*, L. R. 8 Ch. 650; *Sadler v. Great Western Railway Company*, (1895) 2 Q. B. 688; (1896) App. Cas. 450.

(*y*) See *post*, p. 79. See also Nuisances to Property, *post*, Chap. V.

(*z*) See *Lane v. Capsey*, (1891) 3 Ch. 411.

(*a*) *Shelfer v. City of London Electric Lighting Company*, (1895) 1 Ch. 287.

CHAPTER III.

MALICIOUS INJURIES.

I. MALICIOUS ABUSE OF LEGAL PROCESS.

CHAP. III. “IN the present day, and according to our present law, the bringing of an ordinary action, however maliciously, and however great the want of reasonable and probable cause, will not support a subsequent action for malicious prosecution” (a). But the Court has an inherent power to stay or dismiss an action which is clearly shewn to be frivolous or vexatious, or to strike out a statement of claim which discloses on its face no reasonable cause of action (b).

The reason why the subsequent action cannot be maintained seems to be this: There are three sorts of damage any one of which will support an action for malicious prosecution—namely (1) damage to a man's fame, as if the matter whereof he is accused be scandalous; (2) secondly, damage done to the person, as where a man is put in danger to lose his life, or limb, or liberty; (3) the third sort of damage which will support such an action is damage to a man's property, as where he is forced to expend his money in necessary charges to acquit himself of the crime of which he is accused (c). Now the bringing of an ordinary action maliciously and without reasonable or probable cause does not necessarily involve any one of these three heads

(a) Per Bowen, L.J., *Quartz Hill Mining Company v. Eyre*, 11 Q. B. D. 674, at p. 690.

(b) See *Lawrance v. Norreys*, 15 App. Cas. 210; *Kellaway v. Bury*, 66 L. T. 599; R. S. C. Ord. xxv. r. 4.

(c) See *Savile v. Roberts*, 1 Raym. 374, and *Quartz Hill Gold Mining Company v. Eyre*, 11 Q. B. D. 674, at p. 689; cf. *Byne v. Moore*, 5 Taunt. 187.

of damage so as to enable the defendant to bring a subsequent action against the plaintiff. At the trial his fame will be cleared if it deserves to be; the bringing of the action involves no injury to his person; nor, thirdly, is there necessarily any damage to his property, as if he succeeds he will be awarded the costs of the action if he deserves them (*d*).

But although the bringing of an action maliciously and without reasonable or probable cause does not give a cause of action to the defendant as it does not necessarily or naturally involve damage, there are legal proceedings which do necessarily and naturally involve damage, and which when taken falsely and maliciously and without reasonable or probable cause lay the foundation of an action. Proceedings of this kind will now be briefly dealt with.

Malicious Arrests.—By 32 & 33 Vict. c. 62, s. 6, it is enacted that where the plaintiff in any action in a superior court, in which, if brought before the commencement of the Act, the defendant would have been liable to arrest, proves at any time before final judgment by evidence on oath, to the satisfaction of a judge, (1) that he has a good cause of action against the defendant to the amount of £50 or upwards, (2) that there is probable cause for believing that the defendant is about to quit England unless apprehended, and (3) that the absence of the defendant from England will materially prejudice the plaintiff in the prosecution of his action, the judge may order the defendant to be arrested and imprisoned for a period not exceeding six months, unless he gives security, not exceeding the amount claimed in the action, that he will not leave England without the leave of the Court. An action may be brought for maliciously procuring an arrest under this section if the party procuring it has imposed on the judge by some false statement, some *suggestio falsi* or *suppressio veri*, and has thereby satisfied him, not

Arrest on
mesne
process.

(*d*) *Quartz Hill Gold Mining Company v. Eyre, ubi supra.*

CHAP. III.

only as to the existence of the debt to the requisite amount, but also that there is reasonable ground for supposing that the debtor is about to quit the country. But if, without any such fraud or falsehood, a plaintiff, upon an affidavit, fairly stating the facts, satisfies a judge that the defendant is about to quit the country, and so obtains an order for an arrest, he will not be liable to an action for such arrest, even though the order should be subsequently set aside (*e*).

Onus of proving absence of reasonable cause on plaintiff.

Malicious Prosecution.—There is one well-recognised distinction between an action for false imprisonment and an action for malicious prosecution—namely, that in the former the onus lies upon the *defendant* to plead and prove affirmatively the existence of reasonable cause as his justification, whereas in an action for malicious prosecution the *plaintiff* must allege and prove affirmatively its non-existence (*f*). A person may become liable to an action for false imprisonment by setting a ministerial officer, such as a police-constable, in motion, but by setting a judicial officer in motion he may render himself liable to an action for malicious prosecution (*g*), and consequently, in an action for false imprisonment, damages cannot be recovered for a remand ordered by the magistrate, this being the act of a judicial officer (*h*). A County Court has now jurisdiction to entertain actions for malicious prosecutions as well as actions for false imprisonment (*i*).

A plaintiff to succeed in an action for malicious prosecution must prove three things: (1) that the proceedings terminated in his favour if from their nature they were capable of such termination, (2) absence of reasonable and probable cause, and (3) malice.

(*e*) *Daniels v. Fielding*, 16 M. & W. 200; see also *Williams v. Smith*, 14 C. B. N. S. 596, at p. 623.

(*f*) *Hicks v. Faulkner*, 8 Q. B. D. 167.

(*g*) *Austin v. Dowling*, L. R. 5 C. P. 534.

(*h*) *Lock v. Ashton*, 12 Q. B. 871.

(*i*) 51 & 52 Vict. c. 43, s. 56.

(1) *Termination of the Proceedings in Plaintiff's* CHAP. III.

Favour.—With regard to the first of these three essential conditions, it has been held that it even applies to a case where the plaintiff has been summarily convicted under a statute giving no right of appeal. The reason of the condition or rule generally is, that if, in the proceedings complained of, the decision was against the plaintiff, and was still unreversed, it would not be consistent with the principles upon which law is administered for another Court, not being a court of appeal, to hold that the decision was come to without reasonable and probable cause. And if a Court were to yield to the argument that in a particular case there was no right of appeal, it would be constituting itself a court of appeal in a matter where the Legislature has thought fit to declare that there should be no appeal (*k*). But proof of the termination of the proceedings in plaintiff's favour may be dispensed with if they are not capable of so terminating: where, for example, under the old law, a person procured another to be bound over by justices to keep the peace, the latter not being allowed to controvert the statement made against him (*l*). This, however, is not so now, as such a proceeding is no longer *ex parte* (*m*).

(2) *Absence of Reasonable and Probable Cause*.—In the determination of the question whether or not the plaintiff has discharged the onus which lies on him of shewing that the defendant had not reasonable and probable cause for the prosecution instituted by him, it is a rule of law that the jury must find the *facts* on which the question of reasonable and probable cause depends, and the judge is then to decide whether the facts so found constitute reasonable and probable cause: *Lister v. Perryman* (*n*). The House of Lords, in the

Jury to find facts; judge to decide on facts so found.

(*k*) *Basébé v. Matthews*, L. R. 2 C. P. 684.

(*l*) *Basébé v. Matthews*, *supra*; *Steward v. Gromett*, 7 C. B. N. S. 191, 206.

(*m*) See Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 25.

(*n*) L. R. 4 H. of L. 521.

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Reasonable
and probable
cause—
what is.

case just cited, quoted with approval the words of Tindal, C.J., in *Broad v. Ham* (o): "In order to justify a defendant there must be a reasonable cause, such as would operate on the mind of a discreet man; there must also be a probable cause such as would operate on the mind of a reasonable man; at all events, such as would operate on the mind of the party making the charge; otherwise there is no probable cause for him." In the case of *Hicks v. Faulkner* (p), Hawkins, J., uses language somewhat similar, though more amplified: "Now I should define reasonable and probable cause to be an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed. There must be—first, an honest belief of the accuser in the guilt of the accused; secondly, such belief must be based on an honest conviction of the existence of the circumstances which led the accuser to that conclusion; thirdly, such secondly mentioned belief must be based upon reasonable grounds (by this I mean such grounds as would lead any fairly cautious man in the defendant's situation so to believe); fourthly, the circumstances so believed and relied on by the accuser must be such as to amount to reasonable ground for belief in the guilt of the accused." One or two cases may well be cited as examples of what will amount to reasonable and probable cause. In *Lister v. Perryman* (q), an action for false imprisonment, it appeared that Lister was the owner of a rifle which was left in the care of his coachman, Hinton. The rifle had been seen and admired by Perryman, who said that he should like to have one

(o) 5 Bing. N. C. 722.

(p) 8 Q. B. D. 167, at p. 171.

(q) L. R. 4 H. of L. 521.

like it. This was mentioned (after the rifle had been stolen) to Lister by Hinton, who also told him that Robinson, the coachman of a near neighbour, said he had seen the rifle in a barn belonging to Perryman's father; that Perryman, hearing of this, offered to, and did, take Hinton and Robinson to the barn and shewed them a gun (which was not Lister's), and that Robinson said that that was not the gun he had previously seen in the barn. Lister thereupon, and before he had seen Robinson, gave Perryman into custody on the charge of stealing the rifle. Perryman was tried and acquitted, and then brought an action for false imprisonment. The House of Lords held, that Lister had acted on reasonable and probable cause, inasmuch as he had acted on the information of a trustworthy servant, who had told him that he had gone with Robinson to the accused, and that Robinson, in the presence of the accused, repeated the accusation which he had previously made.

In *Hicks v. Faulkner* (r) the facts were these:—At the hearing of a plaint in the county court to recover rent, the tenant's son was called as a witness, and swore that he had given up the key of the premises to the landlord before the rent accrued due. This the landlord denied, and he subsequently prosecuted the witness for perjury. The witness, having been acquitted, brought an action against the landlord for malicious prosecution. At the trial the plaintiff and defendant repeated their evidence as to the key. The defendant's evidence was corroborated by his diary. The learned judge at the trial directed the jury alternatively (*inter alia*) that if they thought the matter was left in such doubt that they could not arrive at a conclusion as to which of the parties was speaking correctly, then the plaintiff had not made out his case, and the defendant was entitled to a verdict; but that, on the other hand, if they came to the conclusion that the

(r) 8 Q. B. D. 167.

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plaintiff did, in fact, deliver up the key as he swore, but that the defendant, owing to a treacherous memory, had forgotten the occurrence, and went on with the prosecution, honestly believing that the plaintiff had sworn falsely and corruptly, the jury would not be justified in saying that the defendant maliciously, and without reasonable or probable cause, prosecuted the plaintiff, and the defendant would be entitled to their verdict. The jury found a verdict for the defendant, and, upon a motion for a new trial, it was held that this direction was right, and that as a person may reasonably institute a prosecution upon information given him by another which he honestly believes to be true (s), so a man may not unreasonably rely on his own memory, if he never knew it before to be treacherous. But, of course, each case must be judged by its own circumstances, and it would be unreasonable to rely either on an informant known to be untrustworthy, or a memory known to be unreliable, without substantial confirmation.

The most recent case of importance on the subject of reasonable and probable cause is *Abrath v. North-Eastern Railway Company (t)*. There one McMann had recovered from the defendants, who were the respondents, a large sum of money as compensation for personal injuries in respect of a railway collision. Certain information having been given to the directors of the company, they caused inquiries to be made by their solicitor. The results of those inquiries were laid before counsel, who advised that the appellant, Dr. Abrath, should be prosecuted for conspiring with McMann to defraud the company by falsely pretending that McMann had been injured in the collision, and by artificially manufacturing symptoms of injury. The respondents thereupon prosecuted the appellant, who, having been acquitted, sued the respondents for

(s) See *c.g.*, *Lister v. Perryman*, *ubi supra*.

(t) 11 App. Cas. 247.

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malicious prosecution. The House of Lords upheld the direction of Cave, J., who told the jury that it was for the plaintiff to establish a want of reasonable and probable cause, and malice, and to shew that the defendants had not taken reasonable care to inform themselves of the true facts of the case, and asked the jury whether they were satisfied that the defendants did take such care and honestly believed in the case laid before the magistrates.

If a person, having taken reasonable care to ascertain the true facts of a case, lays them all fairly before counsel, and acts *bonâ fide* upon the opinion given by that counsel (however erroneous that opinion may be), he is not in general liable to an action for malicious prosecution (u). But he may be so if he does not act *bonâ fide* on the opinion, or does not believe that he has a case for a prosecution (u), or does not lay all the facts before counsel, or selects one under whose ignorance he hopes to shelter his malice (x).

Where proceedings taken under advice of counsel.

(3) *Malice*.—We now come to the third essential which a plaintiff in such an action as we have been discussing has to prove—namely, malice on the part of the defendant. This is a question entirely for the consideration of the jury, as the question of reasonable and probable cause is one for the judge upon the facts found by them. “In order to support such an action,” says Tindal, C.J., “there must be a concurrence of malice in the defendant and want of probable cause. Malice alone is not sufficient, because a person actuated by the plainest malice may nevertheless have a justifiable reason for prosecution. On the other hand, the substantiating the accusation is not essential to exonerate the accuser from liability to an action; for he may have had good reason to make the charge, and yet be compelled to abandon the prosecution by the death or absence of witnesses, or the difficulty of pro-

Malice, a question for the jury.

(u) *Ravenga v. Muckintosh*, 2 B. & C. 693; cf. *Hewlett v. Cruchley*, 5 Taunt. 277.

(x) *Hewlett v. Cruchley*, *supra*.

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Malice, what
is ?

ducing adequate legal proof. The law, therefore, only renders him responsible where malice is combined with want of probable cause. What shall amount to such a combination of malice and want of probable cause is so much a matter of fact in each individual case as to render it impossible to lay down any general rule on the subject; but there ought to be enough to satisfy a reasonable man that the accuser had no ground for proceeding but his desire to injure the accused" (y). As to what amounts to malice, it has been laid down that "any motive other than that of simply instituting a prosecution for the purpose of bringing a person to justice is a malicious motive on the part of the person who acts in that way" (z). Hawkins, J., in the case already referred to, *Hicks v. Faulkner* (a), puts it in a slightly different way: "The malice necessary to be established is not even malice in law, such as may be assumed from the intentional doing of a wrongful act (b); but malice in fact—*malus animus*—indicating that the party was actuated either by spite or ill-will towards an individual, or by indirect or improper motives, though these may be wholly unconnected with any uncharitable feeling towards anybody." It is clear, then, that it is a question to be determined by the jury, whether the defendant was or was not actuated by spite or ill-will, or an indirect or improper motive.

It is sometimes laid down that though malice will not shew that there is a want of reasonable and probable cause, yet, when there is no reasonable or probable cause, it is for the jury to infer malice from the facts proved (c). But this must not be misunderstood. The question of reasonable and probable cause

(y) *Willans v. Taylor*, 6 Bing. 283, at p. 186; affirmed 2 B. & Ad. 845.

(z) *Stevens v. Midland Counties Railway Company*, 10 Ex. 352, 356; see also *Mitchell v. Jenkins*, 5 B. & Ad. 588.

(a) 8 Q. B. D. 167, 175.

(b) *Bromage v. Prosser*, 4 B. & C. at p. 255.

(c) *Johnstone v. Sutton*, 1 T. R. 510, 545; *Mitchell v. Jenkins*, 5 B. & Ad. 588.

is, as we have seen, a question for the judge, and if the jury agree with the judge that there was no reasonable or probable cause, they may, if they choose, infer therefrom that there was malice ; but they are not bound to do so, as they may come to the conclusion that the defendant acted honestly and without ill-will, or any other motive or desire than to do what he *bonâ fide* believed to be right in the interests of justice (*d*). And where a jury find that the defendant honestly believed in the charge made by him, they ought not to infer malice if there is no evidence of it beyond the absence of reasonable and probable cause (*e*).

Where Defendant was Bound over to Prosecute.—A prosecution may be malicious, though the defendant was bound over to prosecute, if the defendant made the charge maliciously and without reasonable and probable cause (*f*). So, too, a person who prosecutes another ought to abandon the prosecution at the earliest opportunity when convinced of the innocence of the person prosecuted. Thus where a defendant in an action in a county court knowingly and falsely swore that the signature to an acknowledgment was signed by the plaintiff, which was denied by the plaintiff, and the judge thereupon, believing that the plaintiff had committed perjury, committed him for trial, and bound over the defendant to prosecute, and the defendant accordingly appeared before the grand jury and repeated his false evidence before them, and the plaintiff was tried and acquitted, it was held that he had a good cause of action against the defendant. Cockburn, C.J., in giving judgment, said : “ In my opinion . . . a prosecution, though in the outset not malicious, . . . may nevertheless become malicious in any of the stages through which it has to pass if the prosecutor, having acquired positive knowledge of the innocence of the accused, perseveres *malo animo* in the

(*d*) *Hicks v. Faulkner*, 8 Q. B. D. 167.

(*e*) *Brown v. Hawkes*, (1891) 2 Q. B. 718.

(*f*) *Dubois v. Keats*, 11 A. & E. 329.

CHAP. III. prosecution with the intention of procuring *per nefas* a conviction of the accused" (g).

(4) *Damage*.—If in an action for malicious prosecution no damage of the first or second sort mentioned above is necessarily involved, the plaintiff should be prepared with evidence that by reason of the prosecution he has suffered in pocket (h). Thus a plaintiff, who in an action for maliciously indicting him for an assault only gave in evidence the indictment which had been drawn against him, and presented to the grand jury and ignored by them, was non-suited (i).

Corporations.—It is curious to find that at the present day there should be any doubt as to whether an action for malicious prosecution can be sustained against a corporation aggregate. That such a corporation may be liable in an action of trover was clearly laid down in *Yarborough v. Bank of England* (k). Again, in *Eastern Counties Railway v. Broom* (l) it was held that an action for assault and battery would lie against a corporation if it could authorise the act complained of, and it was done by their authority. So actions for false imprisonment, for malicious libel, for maliciously obstructing a person in his business, have been held to lie against corporations or companies (m). But in *Stevens v. Midland Railway Company* (n) Alderson, B., expressed an opinion that an action for malicious prosecution would not lie against a corporation aggregate, for that "in order to support the action it must be shewn that the defendant was actuated by a motive in his mind, and

(g) *FitzJohn v. Mackinder*, 9 C. B. N. S. 505.

(h) *Ante*, p. 44.

(i) *Byrne v. Moore*, 5 Taunt. 187; cf. *Quartz Hill Gold Mining Company v. Eyre*, 11 Q. B. D. 674, at p. 691.

(k) 16 East, 6.

(l) 6 Ex. 314.

(m) *Goff v. Great Northern Railway Company*, 3 E. & E. 672; *Whitfield v. South-Eastern Railway Company*, E. B. & E. 115; *Green v. London General Omnibus Company*, 7 C. B. N. S. 290.

(n) 10 Ex. 352.

a corporation has no mind." The other judges of the Court, however, declined to commit themselves to this proposition, and it was disapproved in *Green v. London General Omnibus Company* (o) and *Edwards v. Midland Railway Company* (p). On the other hand, in *Abrath v. North-Eastern Railway Company* (q), Lord Bramwell maintained that no such action will lie against a corporation. No argument, however, on the point took place, and the current of authority is opposed to the dictum of his lordship (r).

Maliciously presenting a Winding-up Petition.—On the principles above indicated, an action will lie against a person who, falsely and maliciously, and without reasonable or probable cause, presents a petition to wind-up a trading company, for the company's credit must be injured by the presentation and advertisement of the petition (s).

Maliciously procuring an Adjudication of Bankruptcy.—So, too, an action may be maintained against a person who, maliciously and without reasonable or probable cause, procures an adjudication of bankruptcy against another (t); but in such a case the action will not lie unless the adjudication has been set aside (u). It has been said that the presentation of a bankruptcy petition against a trader under the circumstances above stated would be actionable (x); but as bankruptcy petitions are heard in chambers, and are not advertised, the statement may possibly bear further discussion.

(o) *Ubi supra*.

(p) 6 Q. B. D. 287; see also *Kent v. Courage*, 55 J. P. 264.

(q) 11 App. Cas. 247.

(r) See *Reg. v. Tyler and The International Commercial Company, Limited*, (1891) 2 Q. B. 588; *Rayson v. South London Tramways Company*, (1893) 2 Q. B. 304 (action for malicious prosecution).

(s) *Quartz Hill Gold Mining Company v. Eyre*, 11 Q. B. D. 674.

(t) *Metropolitan Bank v. Pooley*, 10 App. Cas. 210.

(u) *Ib.* See ante, p. 47.

(x) *Quartz Hill Gold Mining Company v. Eyre*, supra, citing *Johnson v. Emerson*, L. R. 6 Ex. 329.

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Maintenance.—"Maintenance," says Blackstone, "is an officious intermeddling in a suit which in no way belongs to one by maintaining or assisting either party with money or otherwise to prosecute or defend it" (y). It is in fact a criminal act, and an action may be brought by the party damnified against the person who has committed such criminal act (z). "A man may, however, maintain the suit of his near kinsman, servant, or poor neighbour, out of charity and compassion, with impunity" (a); so "maintenance" of this kind is not actionable (b). A man is not guilty of maintenance if he has, or, on reasonable grounds, *bona fide* believes that he has a common interest in the subject-matter of the action, or "the thing in variance," or in a material issue raised in the action. Thus, "if a tenant in tail or for life be impleaded, he in remainder or reversion may lawfully maintain the defence of the suit with his own money" (c). But a man has no common interest in an action merely because in it his character and actions will be unavoidably made the subject of very free comment. Thus T. brought an action for a libel, which reflected not only upon himself but upon H. The latter advised him to bring the action, and employed his own solicitor to conduct it. The defendant succeeded, but was unable to get the costs from T.: held, in an action for maintenance against H., that H. was liable for such costs (c).

II. OTHER MALICIOUS INJURIES.

Maliciously inducing a person to commit a Breach of Contract.—Since the decision in the House of Lords in *Allen v. Flood*, reversing the judgment of

(y) Bl. Comm. Bk. 4, c. 10, s. 12.

(z) *Bradlaugh v. Newdegate*, 11 Q. B. D. 1; *Metropolitan Bank v. Poolcy*, 10 App. Cas. 210, 218.

(a) Bl. Comm. *ubi supra*.

(b) *Harris v. Brisco*, 17 Q. B. D. 504.

(c) *Alabaster v. Harness*, (1894) 2 Q. B. 897; (1895), 1 Q. B. 339. The judgment will shew the risk which solicitors may run in bringing "speculative" actions.

CHAP. III.

*Allen v.
Flood.*

the Court of Appeal (*d*), it must now be taken to be the rule that the existence of a bad motive when the act complained of is not in itself illegal, will not make that act a civil wrong for which reparation is due. The cases of malicious prosecution and libel and slander are apparent rather than real exceptions. The person against whom the criminal law is put in motion without reasonable and probable cause is *prima facie* wronged, but the law, from considerations of public policy and lest men should be deterred from prosecuting persons on proper occasions, saves the prosecutor from liability for what was *prima facie* a wrongful act, if he acted in good faith and without an evil motive. So, too, a man who defames another by false allegations is liable to an action, however good his motive and however honestly he believes in the truth of the allegations. But here again there are certain occasions which the law on grounds of public policy regards as privileged, and where the false and defamatory statement is made on one of such occasions the author of it is excused if he acted *bonâ fide* and not from a bad motive. But the gist of an action for libel and slander is that the statement was false and defamatory, and of an action for malicious prosecution, that criminal proceedings were taken against the plaintiff without reasonable and probable cause.

In *Allen v. Flood* (sup.), the delegate of a trade union induced employers not to retain in their employment the plaintiffs, who were not members of the union, by stating that unless they were sent away the union men would be called out. The employers, who were not bound to retain the plaintiffs, but would have done so but for the threat, discharged them. There was evidence that the object of the delegate was to punish the plaintiffs for having formerly acted contrary to the rules of the union, and the jury found that he

(*d*) (1898) App. Cas. 1; reversing *Flood v. Jackson*, (1895) 2 Q. B. 81.

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acted maliciously, in the sense that he had an indirect object of doing mischief to the plaintiffs. It was held, that as no legal right of the plaintiffs had been violated, the existence of a bad motive could not give a cause of action. It will be observed that the employers were not induced to do an unlawful act or actionable wrong, as the plaintiffs were merely engaged by the day, and this distinguishes the case from cases like *Lumley v. Gye* (e), where the third person was induced to commit a breach of contract. Again, the decision in *Allen v. Flood* does not affect cases where an act done by a third party, though within his rights, has been induced by illegal means directed against that third party, such as fraud or violence, or by an unlawful conspiracy. It has since been held that a conspiracy (not criminal) to do a certain act, and the doing of it, are not actionable, unless the act, if done by an individual, would constitute a civil injury to another (ee).

The effect of *Allen v. Flood* on previous cases is as follows: *Lumley v. Gye* (sup.) and *Bowen v. Hall* (f), so far as they decide that a man who wilfully and knowing that he is procuring a breach of contract (whether it be one of personal service or not), procures a party to commit such a breach, is liable to an action, are not affected by *Allen v. Flood*, but they are open to review hereafter in the House of Lords. They cannot, however, be supported on the ground mentioned in the latter of them that the gist of an action of this kind is that the persuasion was used for the indirect purpose of injuring the plaintiff or benefiting the defendant at the plaintiff's expense. The Court in *Bowen v. Hall* appears to have wrongly interpreted the word "maliciously" in *Lumley v. Gye*, a word which does not in law necessarily imply an evil motive: see *Allen v. Flood*, pp. 123-4.

(e) 2 E. & B. 216.

(ee) *Huttley v. Simmons*, (1898) 1 Q. B. 181 : cf. *Allen v. Flood*, at p. 140.

(f) 6 Q. B. D. 333 ; see also *Temperton v. Russell*, (1893) 1 Q. B. 715.

Malicious injury to a Person's Property or **CHAP. III.**

Trade.—Again, it seems to have been thought from certain dicta of the Court of Appeal in *Mogul Steamship Co. v. McGregor, Gow and Co. (g)*, that an act not otherwise wrongful becomes so if it interferes with another's trade or employment. A case before Lord Holt was believed to give some support to this proposition. There the plaintiff alleged that his "decoy" was disturbed by the defendant having fired guns near it, and so driven away the wild-fowl, with the intention and effect of injuring the plaintiff's trade. Holt, C.J., held that the action well lay, for that the use of a "decoy" is a lawful trade, and that he who hinders another in his trade or livelihood is liable to an action if the injury is caused by "a violent or malicious act;" but it was added that the defendant might, if he had chosen, have set up a decoy of his own on his own ground (h). The House of Lords in *Allen v. Flood* do not expressly overrule this case, but suggest that the decision in it may have been justified on the ground that what the defendant did amounted to a "nuisance." The extent to which efforts may be made to capture another's trade is shewn by the *Mogul Steamship Co.'s Case*, already referred to. There the defendants, who were owners of ships trading between China and Europe, with a view to obtain for themselves a monopoly of the homeward tea trade and thereby to keep up the rate of freight, formed themselves into an association, and agreed that the division of cargoes and the rates of freight should be a matter of arrangement, that they would allow a rebate of 5 per cent. to all shippers who shipped only with members of the association, and that agents of members should be prohibited from acting in the interest of competing

(g) 23 Q. B. D. 598 ; see in H. of L. (1892), App. Cas. 25 ; see also *Kearney v. Lloyd*, 26 L. R. (Ir.) 268.

(h) *Keeble v. Hickeringill*, 11 Mod. 74, 131 ; 11 East, 574 (n). *Allen v. Flood* overrules *Carrington v. Taylor*, 11 East, 571, where a defendant, who was within his rights in shooting wild-fowl in a creek of the sea, disturbed, by the noise of his shooting, the wild-fowl in the plaintiff's decoy.

CHAP. III. shipowners. Any member might withdraw from the association on giving notice. The plaintiffs were not allowed to become members of the association, and could not carry cargoes at remunerative rates as the association had reduced the rates to a point at which there could be no profit, and so the plaintiffs were damaged. It was held, however, that an action in respect of such damage would not lie, for what the defendants had done was done with a view of keeping the trade in their own hands, and they had not used unlawful means, such as misrepresentation or compulsion. It will be observed that as pointed out in *Allen v. Flood* (p. 140) the object of the defendants was to induce shippers to contract with them, and not with the plaintiffs, and so to benefit themselves at the expense of the plaintiffs.

Slander of Title.—An unfounded assertion that the owner of real property has no title to it—if made under such circumstances that the law would imply malice, or if express malice be proved and special damage be shewn—as, for instance, that a bargain to sell the land has been lost—is held to give a cause of action. This is slander of title properly so called; but a similar rule applies where a false and malicious assertion relates to goods, and damage arises from the loss of a bargain to sell them (*l*). But where a person claims a right in himself which he intends to enforce against a purchaser, he is entitled, and indeed ought, to give the intending purchaser warning of such intention, and an action will not lie for giving such warning, unless it can be shewn either that the threat was made *malâ fide*, only with the intent to injure the vendor, and without any intention to follow it up by an action, or that the circumstances were such as to make the bringing of an action altogether wrongful (*m*).

(*l*) *Wren v. Field*, L. R. 4 Q. B. 730.

(*m*) *Ibid.* See also *Thorley's Cattle Food Company v. Massam*, 14 Ch. D. 763; *Dicks v. Brooks*, 15 Ch. D. 22; *Halsey v. Brotherhood*, 19 Ch. D. 386.

***Malicious Falsehood affecting a Man's Trade.*—**CHAP. III.

Analogous to an action for slander of title is an action for a malicious falsehood concerning one's trade or business by which special damage has been caused. Thus, an action was successfully brought against a defendant who falsely and maliciously published of the plaintiff that he had ceased to carry on his business whereby the plaintiff suffered damage (*n*). The gist of the action is special damage, and the plaintiff must prove this, and also that the representation complained of was untrue, and in disparagement of his goods (*o*). Thus a defendant sold the plaintiff's "Infant's Food," affixing to plaintiff's wrappers a label stating that defendant's food for infants was far more nutritious and healthful than any other. It was not proved that the statement was untrue, or that the plaintiff had sustained damage: held, that the action must fail (*p*). But it is doubtful if in any case an action lies where A. says that his goods are better than B.'s, or where he says that they are better in this or in that way (*p*).

As to Special Damage.—In actions of the kind now under discussion special damage must be proved. There is some ambiguity in the term "special damage," but for the present purpose it does not necessarily mean particular, as distinguished from and beyond general damage, but actual loss which has in fact occurred. Thus a plaintiff proved, as the result of a false and malicious statement respecting his business, not a loss of particular customers, but a general falling off in business, and that was held sufficient (*q*).

As to Patents.—With regard to patents, s. 32 of the Patents Designs and Trade Marks Act, 1883 (*r*), altered the law. By that section an action will lie against any

(*n*) *Ratcliffe v. Evans*, (1892) 2 Q. B. 524.

(*o*) *White v. Mellin*, (1895) App. Cas. 154.

(*p*) *White v. Mellin*, *ubi supra*.

(*q*) *Ratcliffe v. Evans*, (1892) 2 Q. B. 524.

(*r*) 46 & 47 Vict. c. 57.

CHAP. III. person who threatens another, by circulars, advertisements or otherwise, with legal proceedings or liability in respect of the manufacture, use, sale or purchase of any invention, unless the matter to which the threat applies is in fact an infringement of the legal rights of the threatener, or unless he forthwith brings an action to shew the validity of the threat; and it will be no defence to such action to say that the threat was made *bonâ fide* or on a privileged occasion (s).

(s) *Skinner & Co. v. Shew & Co.*, (1893) 1 Ch. 413. S. C. (1894) 1 Ch. 581.

CHAPTER IV.

TORTS IN RESPECT OF FAMILY AND DOMESTIC RELATIONS.

Torts to Marital Rights.—The injuries that may be offered to a person, considered as a husband, are principally three: (1) Abduction, or taking away a man's wife; (2) Adultery, or criminal conversation with her; (3) Beating or otherwise abusing her (*a*). CHAP. IV.

Abduction.—By the common law a husband is entitled to recover damages against such as take away his wife by force or fraud. And he has a similar right of action against any one who persuades or entices the wife to live separate from him without a sufficient cause (*a*). Ill treatment on the part of the husband, whereby the wife is forced to leave the house through fear of bodily injuries, is such "sufficient" cause (*b*).

Adultery.—For this the law gave to the husband a writ of trespass *vi et armis* against the adulterer. The action of criminal conversation was abolished by 20 & 21 Vict. c. 85 (The Divorce and Matrimonial Causes Act), s. 59. But by s. 33 of that Act it is provided that any husband may, either in a petition for dissolution of marriage, or for judicial separation, or in a petition limited to such object only, claim damages from any person on the ground of his having committed adultery with the wife of such petitioner. The damages to be recovered on such petition are in all cases to be ascertained by a jury, and after the verdict the Court has power to direct in what manner such damages shall be

(*a*) Black. Comm. III. 139. Where a wife refuses to live with her husband he is not entitled to keep her in confinement to compel her to do so: *Reg. v. Jackson*, (1891) 1 Q. B. 671.

(*b*) *Berthon v. Cartwright*, 2 Esp. 480.

CHAP. IV.

paid or applied, and to direct that the whole or any part thereof shall be settled for the benefit of the children (if any) of the marriage, or as a provision for the maintenance of the wife.

The amount of damages is not to be measured by the co-respondent's wealth, but by the injury (if any) which the husband has sustained through the co-respondent's act (c).

Beating or otherwise ill-using a Wife.—For this at common law an action may be brought in the names of the husband and wife jointly. But if the mal-treatment be “very enormous,” so that thereby the husband is deprived for any time of the company and assistance of his wife, the law then gives him a separate remedy by an action for damages for such mal-treatment, “*per quod consortium amisit*”(d). As to the first of these two actions s. 2 of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), provides that a married woman shall be capable of suing and being sued, in tort, in all respects as if she was a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her.

Torts to Parental Rights.—For the abduction of children the common law gave a remedy by action of *trespass vi et armis, de filio (vel filia) rapto vel abducto* (e); and for injuries to children a remedy to the parent was developed through a fiction of service due from child to parent, and this will be dealt with under the next heading.

Torts in Respect of Domestic Relations.—Blackstone (f) mentions two kinds of injuries: (1) Retaining a man's hired servant before his time is expired;

(c) *Darbishire v. Darbishire and Baird*, 62 L. T. 664.

(d) Black. Comm. III. 140.

(e) *Ibid.* There were doubts, with which Blackstone, however, did not agree, whether such an action lay where children other than the heir were abducted.

(f) Comm. III. 141.

(2) Beating or confining him in such a manner that he is unable to perform his work. CHAP. IV.

(1) As to the first of these, the retention, to be actionable, must be with notice of the existing contract of service (*g*), and an action may also be brought for enticing away a man's servant. This head of injury is not confined to the case of master and servant, but will include that of employer and employed (*h*).

Where a deed of apprenticeship is entered into with an infant, the master's remedy, if the infant misbehave himself, is to correct him or complain to a justice of the peace to have him punished; but no action can be brought against the infant on his covenants in the deed of apprenticeship; and so a covenant not to enter, during the term of apprenticeship, into the employment of any person save the master will not be enforced by an injunction against the infant or against a third person who takes him into his employment (*i*). And if such a deed of apprenticeship is unreasonable, and therefore not binding upon the infant, an action will not lie against a third person for enticing the infant away from his master's service (*k*).

(2) *Injuries to a servant*.—"In this case," says Blackstone (*l*), "besides the action of battery or imprisonment which the servant himself may have against the aggressor, the master also, as a recompense for his immediate loss, may maintain an action of *trespass vi et armis*; in which he must allege and prove the special damage he has sustained by the beating of his servant, *per quod servitium amisit*, and then the jury will make him a proportionable pecuniary satisfaction."

Injuries to children capable of rendering service.—If a child living with its parent is capable of performing

(*g*) F. N. B. 167; Winch. 51.

(*h*) *De Francesco v. Barnum*, 63 L. T. 514.

(*i*) S. C. 43 Ch. D. 165.

(*k*) S. C. 45 Ch. D. 490.

(*l*) Comm. III. 142.

CHAP. IV. acts of service, the parent may have a similar right of action for injuries done to the child to that which a master has for injuries done to his servant (*m*).

Injuries arising through breach of contract.—Where an injury to a servant, or a child capable of performing acts of service, arises *ex delicto*, the law is clear that the master or parent may have a right to bring an action (*n*). But where the injury arises from a breach of contract entered into with the servant there is some authority for saying that the master or parent has no right of action (*o*). But in the case which appears to decide this the action was brought by the master against a railway company, from whom the servant had purchased his ticket, and the case was decided on demurrer to a declaration in which it was averred that the right of the servant, for whose injuries the master was suing the company, was founded on contract, and this was taken as the premiss on which the case had to be decided. The master of course was not a party to the contract (*p*). The actual decision in the case would therefore seem to be right, though the judgment would perhaps at the present day not be supported, and it is submitted now that if a master were to frame his action in tort, alleging an act of misfeasance, whereby the servant who was lawfully in the defendant's train was injured to the master's loss, a good cause of action would be shewn (*q*). Possibly, too, it

(*m*) *Hall v. Hollander*, 4 B. & C. 660.

(*n*) *Berringer v. Great Eastern Railway Company*, 4 C. P. D. 163, where the action was against a railway company from whom the servant had not taken his ticket.

(*o*) *Alton v. Midland Railway Company*, 19 C. B. N. S. 213. See *post*, p. 100.

(*p*) See *Taylor v. Manchester, Sheffield, and Lincolnshire Railway Company* (1895), 1 Q. B. 134, 140.

(*q*) See last note; see also *Foulkes v. Metropolitan District Railway Company*, 5 C. P. D. 157; *Meur v. Great Eastern Railway Company* (1895), 2 Q. B. 387. In this case plaintiff's servant took a ticket from defendants, and his portmanteau was accepted by them as personal luggage. It contained his livery, which was the property of the plaintiff. Through an act of misfeasance on the part of the defendants' porter the livery was destroyed: held, that the defendants were liable to the plaintiff for the tortious act of the porter.

might be necessary to allege that the servant was at the time engaged in his master's business, as otherwise the damage might be too remote. CHAP. IV.

Injuries causing death.—A master, or parent, cannot maintain an action against a wrongdoer for injuries causing the immediate death of his servant, or child capable of performing acts of service (*r*).

Seduction.—To intermeddle with the relations between master and servant, or to deprive any person of the services of another to which he is entitled, may amount to a tortious act for which an action will lie. The remedy for seduction is founded on this principle, for, while no relief can be obtained by an action on behalf of the person seduced, her master, if able to prove any loss of service as resulting from the seduction, may recover damages from the wrongdoer. The services, even of the slightest kind, which are due from a child to a parent or person *in loco parentis*, are sufficient to support the action; or, as put by Bovill, C.J. (*s*), “no proof of service is necessary beyond the services implied from the daughter's living in her father's house as a member of his family.” But where the person seduced is in the service of another at the time of the seduction, a parent cannot maintain an action, notwithstanding that loss of service subsequently accrued to the parent as a consequence (*t*). However, the bare right to the service is sufficient. For example: the plaintiff's daughter left his house and went into service. Her master dismissed her at a day's notice, and the next day, on her way home, the defendant seduced her. Here, as the real service was put an end to by the master, and as the girl intended to return home, the right of the father to her services revived, and this mere right, without proof of actual service, was held sufficient to support an action (*u*).

(*r*) *Osborn v. Gillett*, L. R. 8 Ex. 88 (Bramwell, B., *diss.*).

(*s*) *Evans v. Walton*, L. R. 2 C. P. 615.

(*t*) *Davies v. Williams*, 10 Q. B. 725.

(*u*) *Terry v. Hutchinson*, L. R. 3 Q. B. 599.

CHAPTER V.

TORTS TO PROPERTY.

CHAP. V. **TORTS** committed in respect of land may come under various heads, amongst the most important of which are trespass, nuisance, waste.

Trespass to
land—what?

A trespass to land has been defined as an entry upon, or any direct and immediate interference with the possession of, the land (*a*). It is sometimes called trespass *quare clausum fregit*, as distinguished from trespass to the person, such as a battery or false imprisonment, and trespass to goods, such as taking away another's chattels, or doing some direct and immediate injury to them. It is, of course, a trespass to enter upon, or to walk or ride upon, another's land. So also it is a trespass to drive nails into a person's wall, or to place stones or rubbish against it (*b*), to fire shot or bullets into another's field (*c*), or, perhaps, even to fire a gun or rifle *over* the field (*d*).

Again, a man may commit a trespass by mowing down a person's meadow, or by pouring water into his yard (*e*), or by allowing domestic animals belonging to him to stray into his neighbour's ground (*f*).

And if a man goes into a highway, the soil of which is vested in another, not for the purpose of using it as a highway, but solely for the purpose of interfering

a) See Bul. & L. 3rd ed. p. 415.

b) *Lawrence v. Obce*, 1 Stark. 22; *Gregory v. Piper*, 9 B. & C. 591.

c) *Pickering v. Rudd*, 1 Stark. 56.

d) This would appear to be a legal grievance, if not technically a trespass; *Clifton v. Bury*, Times L. R. vol. 4, p. 8.

e) *Reynolds v. Clarke*, 2 Raym. 1399.

f) *Lee v. Riley*, 18 C. B. N. S. 722.

with that other's enjoyment of his own property, he is a trespasser (g). CHAP. V.

It will be no answer to an action that the trespass complained of was involuntary and by mistake, as, for example, where the defendant, in mowing his own grass, mowed by mistake a little of his neighbour's, which was growing alongside (h).

Continuing Trespass.—Every continuance of a trespass is a fresh trespass, and an action may be brought in respect of it. Thus, where the defendants, the trustees of a turnpike road, built buttresses to support it on the plaintiff's land, and the plaintiff thereupon sued them in trespass for such erection, and accepted a sum of money paid into court in full satisfaction of the trespass, and thereafter gave the defendants notice to remove the buttresses, it was held that the defendants, upon their refusal to do so, were liable in another action for keeping and continuing the buttresses upon the land (i).

Trespass ab Initio.—Sometimes, though the original entry upon land may not have been wrongful or have amounted to a trespass, it may become so by the defendant's subsequent conduct. This will appear from the well-known *Six Carpenters' case* (k). In that case the defendants, six carpenters, entered the plaintiff's house, which was a common wine-tavern, and called for a quart of wine, and paid for the same. They were then at their request served with another quart of wine, but refused to pay for the same, whereupon the plaintiff brought an action of trespass. The Court held that under the circumstances an action of trespass would not lie, and laid down the following rules :—

(g) *Harrison v. Duke of Rutland* (1893), 1 Q. B. 142; see also *Reg. v. Pratt*, 4 E. & B. 860.

(h) *Basckley v. Clarkson*, 3 Lev. 37.

(i) *Holmes v. Wilson*, 10 A. & E. 503; see also *Bowyer v. Cook*, 4 C. B. 236.

(k) 8 Co. 146 a; 1 Sm. L. C. 127.

CHAP. V.

(1) Where a man abuses an authority or licence given him by the law, he becomes a trespasser *ab initio*.

(2) Where a man abuses an authority or licence given him by another party, he may be punished for such abuse, but he is not a trespasser *ab initio*.

(3) A mere non-feasance (*i.e.*, an omission to do something) cannot make a person who has had an authority or licence given him by the law, a trespasser *ab initio*.

Under the third of these rules the six carpenters were held not liable in trespass, though they would have been liable in an action for the price of the wine.

One consequence of the first of the above rules was that if a landlord, lawfully entering upon premises for the purpose of making a distress, committed an abuse of this right given him by the law—*e.g.*, by converting the goods to his own use—he became a trespasser *ab initio* (*l*); but by a remedial statute, the 11 Geo. II. c. 19, s. 19, it is enacted that where a distress is made for rent justly due, but, through the mistake of the landlord or his bailiff or agent, some irregularity or unlawful act has been afterwards done, the distress itself shall not be therefore deemed to be unlawful, nor the party making it a trespasser *ab initio*; but the party aggrieved by such unlawful act or irregularity may recover full satisfaction for the special damage which he may have sustained thereby, and no more, in an action of trespass or on the case, together with his full costs.

This statute will not give any protection to a landlord to whom rent is due in respect of premises, if he effects an entry in a way not permitted by the law (as, for instance, where he breaks open a window in order to get in), and in such a case he will be liable to the tenant for the full value of the goods taken, without deducting the rent for which the seizure was made (*m*).

(*l*) *Gargrave v. Smith*, 1 Salk. 221.

(*m*) *Attack v. Bramwell*, 3 B. & S. 520; see and *cf.* *Jones v. Foley*, (1891), 1 Q. B. 730.

A subsequent statute of the same reign (17 Geo. II. c. 38), by s. 8 gave a similar protection to overseers of the poor making distresses for money justly due for the relief of the poor, where any subsequent irregularity was committed by the parties distraining.

Who may sue for Trespass.—Trespass is a possessory action founded merely on the possession of land, and it is not at all necessary that the right should come into question (*n*). In other words, whoever is in possession may maintain an action of trespass against a wrongdoer to his possession (*o*). So it was held in *Graham v. Peat* (*p*) that a person in possession of glebe land under a lease void by 13 Eliz. c. 20 (*q*), by reason of the rector's non-residence, might maintain an action of trespass against a wrongdoer. Actual personal occupation is not necessary to enable a person to bring an action of trespass, as an occupation by his servant will be sufficient (*r*). But a person who has let the land to a tenant who is in occupation cannot maintain an action of trespass (*s*), though, as we shall see, he may sue a wrongdoer if his reversion has been injured. Though, however, a person in possession of land, even if he be not legally entitled thereto, may maintain an action of trespass against a wrongdoer, yet he will not be able to do so against the rightful owner. Thus, in *Beddall v. Maitland* (*t*) it was laid down that though a forcible entry upon land may be punishable as a crime under 5 Rich. II. stat. 1, c. 8, yet a person wrongfully in possession cannot recover damages against the rightful owner for a forcible entry—for the entry, because the possession is not legally his, and for the force used therein, because the statute, whilst it creates a crime, gives no civil remedy.

(*n*) *Lambert v. Stroother*, Willes, 218, 221.

(*o*) *Harker v. Birkbeck*, 3 Burr. 1556, at p. 1563.

(*p*) 1 East, 244.

(*q*) Now repealed as to this point.

(*r*) See *Bertie v. Beaumont*, 16 East, 33; *Mayhew v. Suttle*, 4 E. & B. 347.

(*s*) *Cooper v. Crabtree*, 20 Ch. D. 589.

(*t*) 17 Ch. D. 174.

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“As soon as a person is entitled to possession, and enters in the assertion of that possession, or, which is exactly the same thing, any other person enters by command of that lawful owner so entitled to possession, the law immediately vests the actual possession in the person who has so entered. If there are two persons in a field, each asserting that the field is his, and each doing some act in the assertion of the right of possession, and if the question is, Which of those two is in actual possession? I answer, The person who has the title is in actual possession, and the other person is a trespasser. . . . Then that is to be determined, as it seems to me, by the fact of the *title*, each having the same apparent actual possession;—the question as to which of the two really is in possession is determined by the fact of the possession following the title, that is, by the law, which makes it follow the title”(u).

Tenants in Common.—With regard to tenants in common, it is settled law that, unless there be an actual ouster of one tenant in common by another, trespass will not lie by the one against the other so far as the land is concerned (x). But if one tenant in common expel his co-tenant, trespass will lie (y). So, too, if a co-tenant should dig up and carry away the soil of the premises in which there is a co-tenancy (z). But the rights of the co-tenants will to some extent depend upon the nature of the property. Thus, for example, a tenant in common of a coal-mine is entitled to dig and carry away the coal, for otherwise he could not enjoy his share of the common property. The only restriction upon him is that he must not appropriate to himself more than his share (a).

(u) Per Maule, J., *Jones v. Chapman*, 2 Ex. 803, 821. This principle may, it would seem, be applied also to personal chattels, the situation of which is consistent with their being in possession of either of two persons: *Ramsay v. Margrett* (1894), 2 Q. B. 18, 27.

(x) *Jacobs v. Seward*, L. R. 5 H. L. 464.

(y) *Murray v. Hall*, 7 C. B. 441.

(z) *Wilkinson v. Haygarth*, 12 Q. B. 837.

(a) *Job v. Potton*, L. R. 20 Eq. 84.

In the same way, as regards chattels, the cases in which trover would lie against a tenant in common are reducible to this. They are cases in which something has been done which has destroyed the common property, or where there has been a direct and positive exclusion of the co-tenant from the common property, he seeking to exercise his rights therein, and being denied the exercise of those rights. Thus, where a ship was taken possession of and sent to sea by one tenant in common without the consent of his co-tenant, and lost, it was held that the property was destroyed by the act of one tenant in common, and that therefore trover would lie in respect of his co-tenant's share (*b*).

Rights of Reversioner.—Trespass being a possessory action, to use the old nomenclature, it is, or ought to be, brought by the person in possession. The reversioner, however, is not without his remedy, and has a right of action, which, under the old system of pleading, would have been an action on the case, against a wrongdoer by whom his reversion has been damaged. But unless there has been damage to the reversion, or some act done by which it will necessarily be damaged, he will not be entitled to sue (*c*). Thus, a reversioner cannot maintain an action against a stranger for merely entering upon his land held by a tenant upon lease, though the entry be made in exercise of an alleged right of way, such an act during the tenancy not being necessarily injurious to the reversion, for the assertion of a right of way over land whilst it is out on lease would not be evidence of a right against the reversioner (*d*). But where a window was obstructed by the erection of a wall on the adjoining premises, it was held that the reversioner was entitled to a verdict and to recover

Reversioner cannot maintain action of trespass unless the reversion is damaged.

(*b*) *Barnardiston v. Chapman*, Bull. N. P. 34; 4 East, 121 n.; see *Jacobs v. Seward*, *ubi supra*.

(*c*) *Jackson v. Pesked*, 1 M. & S. 234.

(*d*) *Baxter v. Taylor*, 4 B. & Ad. 72.

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damages, for there the obstruction was of a permanent character, and would remain unless something were done to remedy the mischief (*e*). And so building a roof with eaves which discharge rain-water by a spout into adjoining premises is an injury for which the landlord of such premises may successfully sue as reversioner whilst they are under demise, if the jury think there is damage to the reversion (*f*). But where a reversioner sued for injury to his reversion by the erection of workshops and a forge and chimney on land adjoining his houses in the occupation of his tenants, and for smoke which issued from the chimney, and noise caused by the forge, and it was proved that the chimney was built by the defendant's landlord, and that the smoke issued from it in consequence of the fires lighted by the defendant for the purposes of his trade, and that the plaintiff's tenants gave notice to quit, it was held that there was no evidence to prove injury to the reversion, for that, to entitle the plaintiff to maintain the action, the injury complained of must be of a permanent character, and the only act chargeable to the defendant—namely, the lighting of the fires—was not in its nature permanent (*g*).

Rights of Owner of Subsoil.—A person entitled to, and possessed of, the subsoil, may maintain an action of trespass against a party who digs holes in it, although other persons may for the time being have exclusive right to the possession of the surface. Thus, where plaintiffs were seised in fee of certain fields, and had exclusive possession thereof during a certain portion of the year, but the burgesses of Derby had exclusive possession of them for the remainder of the year for the purposes of turning in their horses and cattle, and the defendant, at certain races held on the

(*e*) *Jesser v. Gifford*, 4 Burr. 2141. See also *Mayfair Property Company v. Johnston* (1894), 1 Ch. 508 (placing foundations of a wall in a person's land).

(*f*) *Tucker v. Newman*, 11 A. & E. 40.

(*g*) *Simpson v. Savage*, 1 C. B. N. S. 347. See *Cooper v. Crabtree*, 20 Ch. D. 589.

fields during the latter of these two periods, erected a booth, the posts of which were inserted some depth into the soil, it was held that though the plaintiffs could not maintain an action of trespass against a person who merely rode over the surface, they might maintain such action for the insertion of the posts (*h*).

Right to Adjacent and Subjacent Support.—A right to lateral support from adjoining soil is not, like the support of one building by another, supposed to be gained by grant, but is a right of property passing with the soil. If the owner of two adjoining closes conveys away one of them, the alienee, without any grant for that purpose, is entitled to the lateral support of the other close the very instant the conveyance is executed, as much as after the expiration of twenty years or any longer period. *Pari ratione*, where there are separate freeholds, from the surface of the land and the minerals belonging to different owners, the owner of the surface, whilst it is uncumbered by buildings and in its natural state, is entitled to have it supported by the subjacent mineral strata. Those strata may of course be removed by the owner of them, so that a sufficient support for the surface is left; but if the surface subsides and is injured by the removal of those strata (although, on the supposition that the surface and the minerals belong to the same owner, the operation may not have been conducted negligently, nor contrary to the custom of the country), the owner of the surface may maintain an action against the owner of the minerals for the damage sustained by the subsidence (*i*). This natural right of support, in the absence of any express grant, reservation, or covenant, exists generally, without reference to the nature of the strata, or the difficulty of propping up the surface, or the comparative value of the surface and the

(*h*) *Cox v. Glue*, 5 C. B. 533.

(*i*) *Humphries v. Brogden*, 12 Q. B. 739, at p. 744; see also *Backhouse v. Bonomi*, 9 H. of L. 503.

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minerals (*k*). If the land be not in its natural state, but have buildings erected upon it for which no right of support has been acquired, an adjacent or subjacent owner is not liable for removing soil on his own property, and so causing those buildings to fall (*l*). But the natural right of support for the soil remains notwithstanding the erection of the buildings, and if the land would have subsided by reason of the removal of its natural support, whether the buildings were on it or not, the owner so removing the support will be liable for the damages caused thereby (*m*).

“The right, therefore, to support of land and the right to support of buildings stand upon different footings *as to the mode of acquiring them*, the former being *primâ facie* a right of property, analogous to the flow of a natural river, or of air, though there may be cases in which it would be sustained as a matter of grant (*n*), whilst the latter must be founded upon prescription or grant, express or implied; *but the character of the rights, when acquired, is in each case the same*” (*o*). It is unnecessary to discuss here whether the right of support to a house is, as Lord Selborne thought, an easement, and within s. 2 of the Prescription Act (2 & 3 Will. IV. c. 71), or whether, as Lord Penzance seemed to think in the last cited case, such a right may be maintained after a lapse of twenty years, under the authority of a long series of cases, which on no satisfactory legal ground can be justified.

Justification of Trespass to Land.—The justifications which may be pleaded in an action of trespass to land are (*inter alia*):—

(*k*) *Humphries v. Brogden*, *ubi supra*.

(*l*) See and *cf.* *Partridge v. Scott*, 3 M. & W. 220; *Dalton v. Angus*, 6 App. Cas. 740.

(*m*) *Brown v. Robins*, 4 H. & N. 186. *Seemle*, a lessee of a mine is not responsible to the surface owner for subsidence caused by the workings of his predecessor in title prior to the date of the lease: *Greenwell v. Low Beechburn Coal Company* (1897), 2 Q. B. 165.

(*n*) See *Caledonian Railway Company v. Sprot*, 2 Macq. 449.

(*o*) *Per* Willes, J., in *Bonomi v. Backhouse*, E. B. & E. 646, at p. 654; approved by Lord Selborne, C., in *Dalton v. Angus*, *ubi supra*.

Liberum tenementum: in other words, that at the time of the alleged trespass the land was the freehold of the defendant (p). CHAP. V.
(1) *Liberum tenementum*.

That the defendant entered upon the plaintiff's land to retake his goods, which had been placed there by the plaintiff (q) or feloniously stolen (r), or to deposit there the plaintiff's own goods, which he had wrongfully placed on the defendant's land (s): but it is no justification to enter upon land to retake one's goods simply because they are there (t). (2) Entry to retake or deposit goods.

Leave and licence may justify a trespass. A mere licence, however, is revocable; but that which is called a licence is often something more than a licence; it often comprises or is connected with a grant, and then the party who has given it cannot in general revoke it so as to defeat his grant, to which it was incident (u). Again, it appears that "a licence under seal (provided it be a mere licence) is as revocable as a licence by parol, and, on the other hand, a licence by parol coupled with a grant is as irrevocable as a licence by deed, provided only that the grant is of a nature capable of being made by parol. But where there is a licence by parol coupled with a parol grant, or pretended grant, of something which is incapable of being granted otherwise than by deed, there the licence is a mere licence; it is not an incident to a *valid* grant, and it is therefore revocable. Thus, a licence by A. to hunt in his park, whether given by deed or by parol, is revocable. It merely renders the act of hunting lawful, which without the licence would have been unlawful. If the licence be, as put by Vaughan, C.J. (x), a licence (3) Leave and licence.

(p) *Davidson v. Wilson*, 11 Q. B. 890; *Beddall v. Maitland*, 17 Ch. D. 174.

(q) *Patrick v. Colerick*, 3 M. & W. 483.

(r) *Anthony v. Haney*, 8 Bing. 186.

(s) *Rea v. Sheward*, 2 M. & W. 424.

(t) *Anthony v. Haney*, *ubi supra*.

(u) See *Wood v. Leadhitter*, 13 M. & W. 838; see also *Vaughan v. Hampson*, 33 L. T. 15; *Heap v. Hartley*, 42 Ch. D. at p. 470.

(x) In *Thomas v. Sorrell*, Vaughan, 330, at p. 351.

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not only to hunt, but also to take away the deer when killed to his own use, this is in truth a grant of the deer, with a licence annexed to come on the land ; and supposing the grant of the deer to be good, then the licence would be irrevocable by the party who had given it ; he would be estopped from defeating his own grant, or act in the nature of a grant. But suppose the case of a parol licence to come on my lands, and there to make a watercourse to flow on the lands of the licensee. In such a case there is no valid grant of the watercourse, and the licence remains a mere licence, and therefore capable of being revoked. On the other hand, if such a licence were granted by deed, then the question would be, on the construction of the deed, whether it amounted to a grant of the watercourse ; and if it did, then the licence would be irrevocable "(y).

In connection with this subject, it should be noticed that though a licence be revocable yet there may be cases where, on its revocation, the licensor may be liable for a breach of contract. A. orally agreed with B. to let him his wall for bill-posting at so much a year. B. erected a hoarding, posted bills, and made several payments. A., after notice, pulled down the hoarding. Though the licence was revocable, B. had a right of action for breach of contract (z).

(4) Entries to demand or pay money, to execute process of law, &c.

Again, trespass on another's premises is justifiable "if a man comes thither to demand or pay money there payable, or to execute in a legal manner the process of the law. Also a man may justify entering an inn or public-house without the leave of the owner first specially asked, because where a man professes the keeping of such inn or public-house he thereby gives a general licence to any person to enter his doors. So a landlord may justify an entry to distrain for rent, a commoner to attend his cattle commoning on another's

(y) *Wood v. Leadbitter*, *ubi supra*.

(z) *Kerrison v. Smith* (1897), 2 Q. B. 445, *per Div. Court*: leave to appeal was given.

land, and a reversioner to see if any waste be committed on the estate, for the apparent necessity of the thing" (a).

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Again, where highways or ways of necessity have become impassable, it is for the public good that people should be allowed to pass over the adjoining land; but there is no such privilege in the case of a private right of way where the road has become impassable, for the grantee of such a private right of way must be confined strictly to what has been granted to him (b).

(5) Where highway impassable.

Entry upon another's land may sometimes be justified where the object is to abate an existing nuisance, if such abatement can be effected without a breach of the peace (c). In such a case, notice of the nuisance and a request to abate it should be given to the person on whose land it is. If such notice be given and request made, the nuisance may be abated, even if it be a house inhabited at the time (d). Thus, a commoner, after such notice and request, may pull down a building, even though inhabited, which has been wrongfully erected on the common, and which prevents him from exercising his right as fully as he otherwise might have done (e).

(6) Abatement of nuisance.

However, as the abatement of a nuisance is very likely to lead to a breach of the peace, this remedy is

(a) 3 Blackstone, Comm. 212.

(b) *Taylor v. Whithead*, 2 Dougl. 475; *Bullard v. Harrison*, 4 M. & S. 387.

(c) See Bacon's Abridgement; Nuisance (C); 3 Blackstone, Comm. 5; *Ree v. Rosewell*, 2 Salk. 459; *Mayor of Colchester v. Brooke*, 7 Q. B. 339, at p. 377.

(d) *Davies v. Williams*, 16 Q. B. 546; see *Lane v. Capsey* (1891), 3 Ch. 411.

(e) *Ibid.*; *Jones v. Jones*, 1 H. & C. 1. But it seems that a man may pull down without notice a building on his own land, even though a trespasser be in it at the time; *Burling v. Read*, 11 Q. B. 904. And he may without notice, provided he does not trespass on his neighbour's and, cut the branches of his neighbour's tree, so far as they overhang his own land, even though they have done so for over twenty years: *Leamon v. Webb* (1895), App. Cas. 1.

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rarely resorted to; but, instead of it, the party injured brings an action, and having served a writ, applies at once for an injunction against the continuing of the nuisance.

Distinction between nuisance causing injury to property and nuisance causing personal discomfort.

Nuisances to Property.—In discussing the question of nuisances, it is very desirable to mark the difference between an action brought for a nuisance on the ground that the alleged nuisance produces material injury to property, and an action brought for a nuisance on the ground that what is alleged to be a nuisance is productive of sensible personal discomfort (*f*). With regard to the latter, whether something which causes us personal inconvenience or discomposes or injuriously affects our senses or nerves may or may not be denominated a nuisance must depend greatly upon the circumstances of the locality where the thing complained of actually takes place. If a man lives in a street where there are numerous shops, and a shop is opened next door which is carried on in a fair and reasonable way, he cannot complain because to himself individually there may arise much discomfort from the trade carried on in that shop. So, too, a person must submit to a greater quantity of smoke in a manufacturing town than in a country village (*g*). But when a trade or business is carried on by one person in the neighbourhood of another, and the result of that trade or business is a material *injury to property*, then there arises a very different consideration, for every man, unless enjoying rights obtained by prescription or agreement, is bound to use his own property in such a way as not to injure the property of his neighbours, and if he causes a nuisance of such a kind as to sensibly diminish the value of his neighbour's property, he must be answerable for it. And so a person commits an actionable nuisance if he carries on smelting-works,

(*f*) See as to latter, *ante*, p. 41. See abatement of nuisance, *supra*.

(*g*) *St. Helens Smelting Company v. Tipping*, 11 H. of L. Cas. 642.

the vapours from which destroy the herbage and trees on the land of an adjoining owner (*h*). CHAP. V.

It used to be thought that if a man knew there was a nuisance, and went and lived near it, he could not recover damages, because it was said that it was he that went to the nuisance and not the nuisance to him. That, however, is not the law now (*i*).

The general principle underlying cases of this class is that every man is bound to use his own property in such a way as not to injure his neighbour's ("Sic utere tuo ut alienum non lædas"). This principle may be further illustrated by that class of cases of which *Rylands v. Fletcher* (*k*) is perhaps the most important. In that case Fletcher was the lessee of mines, and Rylands, who was the owner of a mill standing on land adjoining that under which the mines were worked, wished to construct a reservoir, and employed competent persons to construct it. Underneath the piece of land on which it was proposed to construct the reservoir there were certain old and disused mining shafts. The vertical shafts had been filled up with soil and rubbish, and it does not appear that any one knew of them or of the horizontal shafts communicating with them. Fletcher, in the course of working his mine, had gradually worked through the seams of coal, and so came into contact with the old and disused shafts underneath Rylands' land. In that state of things the reservoir was constructed. Afterwards, when it was filled or partly filled with water, the weight of the water, bearing upon the disused vertical shafts, broke through them and into the horizontal workings, and thence into Fletcher's mine, which was flooded, and thereby damage was caused. The House of Lords, in

"Sic utere
tuo ut
alienum non
lædas."

(*h*) *St. Helens Smelting Company v. Tipping*, *ubi supra*; see also and *cf. Robinson v. Kilvert*, 41 Ch. D. 28; *Kreinhardt v. Mentasti*, 42 Ch. D. 685; *Harrison v. Southwark, &c., Company* (1891), 2 Ch. 409; *Christie v. Davey* (1893), 1 Ch. 316; *Barber v. Penley*, 9 T. L. R. 359.

(*i*) *Hole v. Barlow*, 4 C. B. N. S. 334, which was overruled on another point in *Bamford v. Turnley*, 3 B. & S. 66.

(*k*) L. R. 3 H. L. 330.

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Owner of
land who
stores what is
likely to cause
damage does
so at his
peril.

determining that an action for this damage might be maintained, laid down two important principles : first, that the owner or occupier of land may lawfully use it for any purpose for which it might in the ordinary course of the enjoyment of land be used ; and if in what may be called the natural user of that land there is formed an accumulation of water either on the surface or underground, and if by the operation of the laws of nature that accumulation passes into the land of a neighbour, the latter cannot complain. His only course is to erect a barrier for his own protection. But, secondly, if an owner or occupier, not stopping at the natural use of his land, desires to use it for a purpose which may be termed a non-natural use—*e.g.*, for the purpose of introducing into it something which was not in or upon it in its natural condition, for the purpose, say, of introducing water either above or below ground in quantities and in a manner not the result of any work or operation on or under the land—and if, in consequence of his doing so, or in consequence of any imperfection in the mode of his doing so, the water escapes and passes into his neighbour's land, then what has been done has been done at his peril ; and if the water escapes into adjacent or sub-jacent land, causing damage, he will be answerable for it. This second principle is perhaps put more clearly by Blackburn, J., in the court below, quoted with approval by the Lord Chancellor (Lord Cairns) :

“ We think that the true rule of law is, that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril ; and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by shewing that the escape was owing to the plaintiff's default, or perhaps that the escape was the consequence of *vis major* or the act of God ; but, as nothing of this sort

exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali-works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour who has brought something on his own property (which was not naturally there), harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there so that no mischief may accrue, or answer for the natural and anticipated consequence. And upon authority, this we think is established to be the law, whether the things so brought be beasts, or water, or filth, or stench " (l).

The two principles just mentioned may be further illustrated by *Smith v. Kenrick* (m) and *Baird v. Williamson* (n). In the former, the owner of a coal-mine on the higher level worked out the whole of his coal, leaving no barrier between his mine and the mine on the lower level, so that the water percolating through the upper mine flowed into the lower, and obstructed the owner of it in getting his coal. But it was held that the plaintiff, the owner of the lower mine, had no ground of complaint against the defendant, the owner of the upper mine. For the latter had a right to

(l) L. R. 3 H. L. 330, at p. 339; cf. *Giles v. Walker*, 24 Q. B. D. 656 (thistles).

(m) 7 C. B. 515.

(n) 15 C. B. N. S. 376.

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remove all his coal, and was under no obligation to protect the plaintiff against the damage sustained by him, which was occasioned by the natural percolation of water from the upper strata. It may, however, be remarked that the principle of *Smith v. Kenrick* is not applicable where the owner of the foreshore removes a natural barrier against incursions of the sea, and so causes damage to an adjoining landowner; for the Crown is bound to protect the realm from such incursions, and its grantee must not do any act which will let the sea in (*o*). And where, owing to an extraordinary flood, a large body of water pressed against and endangered a railway embankment, it was held that the railway company were not entitled to cut holes in the embankment so as to send the water on to their neighbour's land. This would not be using the embankment in the ordinary way; but, of course, the railway company might have defended themselves beforehand against the incursion of the flood, or have allowed it simply to percolate through the earth to the adjoining land (*p*).

In *Baird v. Williamson* (*q*) the defendant, the owner of the upper mine, did not merely suffer the water to flow through his mine without leaving a barrier between it and the mine below, but for his own purposes pumped up quantities of water which passed into the plaintiff's mine, in addition to that which would have naturally reached it, and so caused him damage. Though this was done without negligence, and in the due working of his mine, he was held responsible for the damage so caused. The damage in the former case may be, says Lord Cranworth, treated as having arisen from the act of God; in the latter, from the act of the defendant.

(*o*) *Attorney-General v. Tomline*, 14 Ch. D. 58.

(*p*) *Whalley v. Lancashire and Yorkshire Railway Company*, 13 Q. B. D. 131.

(*q*) *Ubi supra*.

In *Nichols v. Marsland* (r) the defendant had formed ornamental reservoirs by means of a stream flowing through his land. These had existed for a number of years without having done any harm, but an extraordinary rainfall having taken place, the artificial banks of the reservoirs gave way, and the water, thus suddenly let loose, rushed down the stream and carried away four county bridges. The jury found that there was no negligence in the construction or the maintenance of the reservoirs, but that the flood was so great that it could not reasonably have been anticipated, although, if it had been anticipated, the effect might have been prevented. This the Court of Appeal held to be a finding that the escape of the water was owing to the act of God, and the defendant was so released from liability.

Box v. Jubb (s) was another case of storage of water in a reservoir, and the defendants were held not answerable for the damage caused to the plaintiff's premises by the overflowing of the reservoir, such overflow having been caused, partly by the emptying of a large reservoir above the defendants' premises belonging to a *third person, over whom the defendants had no control*, and partly by an obstruction in the water-course below the defendants' premises, caused by circumstances over which they had no control, and without their knowledge. The Court held that the defendants were not liable, for that what had taken place was caused by a stranger over whom, and at a spot where, they had no control. Whether this was called *vis major* or the unlawful act of a stranger was immaterial; the defendants could not be held liable for what they had no means of preventing.

Again, the right to subterranean water running in no defined channel is a natural right incident to the ownership of land, and if the owner of land draws off for his own purposes all the water beneath it, as well

(r) 2 Ex. D. 1.

(s) 4 Ex. D. 76.

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as that which, coming from his neighbour's land, replaces it, he is only exercising a natural right incident to his ownership, and his neighbour cannot complain, though left without any water (*t*). But if he uses his land in a non-natural way, for example, by putting filth on it in such a position and in such a way that it gets down to the water-bearing strata, and so pollutes his neighbour's wells, then the latter will have a right of action against him for the damage so caused (*u*). "He whose dirt it is must keep it in that it may not trespass" (*x*). In cases of this kind the "trespass" or "escape" of the noxious thing is material, as may be seen from the following illustrations. In *Firth v. Bowling Iron Company* (*y*) the defendants' predecessors had fenced their land with wire rope, which the defendants allowed to remain. From long exposure the strands of the wire became decayed, and pieces of it fell on the plaintiff's adjoining pasture, and one of his cows swallowed a piece and died: the defendants were held liable. So were persons who planted on their own land a yew tree, which projected over a neighbour's land, whose horse ate of it and died (*z*). But where a declaration merely charged that "the defendant was possessed of yew trees, the clippings of which he knew to be poisonous," it was held that such an allegation of fact did not support a duty to take care to prevent the clippings from being put, possibly by a stranger, on his neighbour's land, where horses and cattle might eat them (*a*). Again, plaintiff and defendant occupied adjoining fields separated by a ditch, the plaintiff's boundary being the edge of the ditch. A yew tree on defendant's land projected partly over the ditch, but not over or up to the plaintiff's boundary, and the plaintiff's horse ate of it and died. The

(*t*) *Chasemore v. Richards*, 7 H. of L. Cas. 349. His motive is immaterial: *Mayor of Bradford v. Pickles* (1895), App. Cas. 587.

(*u*) *Ballard v. Tomlinson*, 29 Ch. D. 115.

(*x*) *Tenant v. Goldwin*, 1 Salk. 360.

(*y*) 3 C. P. D. 254.

(*z*) *Crowhurst v. Amersham Burial Board*, 4 Ex. D. 5.

(*a*) *Wilson v. Newberry*, L. R. 7 Q. B. 31.

defendants were not liable to fence against their neighbour's horses or cattle, and there being thus no duty on them to prevent their neighbour's horse from having access to the tree they were held entitled to judgment (b).

Apart from any question of the "escape" of a nuisance, if a man does within his premises what is likely to cause, and does cause, a nuisance outside, he is responsible to his neighbour who is thereby injured. Thus, where the performance of a popular play causes large crowds to assemble near the theatre before the opening of the doors, so that access to the neighbouring houses is obstructed, the lessee of the theatre may be responsible for the nuisance (c). And where boxing entertainments were carried on at a club at night, attracting to the club noisy crowds, an injunction was granted to restrain noise from cabs and carriages going to and from the club between midnight and 7 a.m. (d).

Nuisances in the exercise of Statutory Powers (e).

—This is a subject which cannot be fully treated without reference to the wording of particular statutes which authorise works which may infringe the rights of individuals. These statutes as a rule provide compensation for those whose rights may be infringed by the execution of the works, but if they do not, still the works if expressly authorised may be carried out. The following general propositions are applicable: (1) "Where Parliament has given express powers to construct certain buildings or works according to plans and specifications upon a particular site, and for a specific purpose, the use of these works or buildings in the manner contemplated and sanctioned by the Act, cannot, except in so far as negligent, be

(b) *Ponting v. Noakes* (1894), 2 Q. B. 281.

(c) *Barber v. Penley* (1893), 2 Ch. 247 (Charley's Aunt), a useful case on nuisances by crowds.

(d) *Bellamy v. Wells*, 39 W. R. 158.

(e) See *post*, p. 127.

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restrained by injunction, although such use may constitute a nuisance at common law; and no compensation is due in respect of injury to private rights, unless the Act provides for such compensation being made" (*f*). Or to put it in another way: "If the legislature directs that a thing shall 'at all events' be done, the doing of which, if not authorised by the legislature, would entitle any one to an action, the right of action is taken away. . . . The legislature has very often interfered with the rights of persons, but in modern times it has generally given compensation to those injured; and if no compensation is given, it affords a reason, though not a conclusive one, for thinking that the intention of the legislature was, not that the thing should be done at all events, but only that it should be done, if it could be done, without injury to others" (*g*). (2) Though no action will lie for doing that which the legislature has authorised if it be done without negligence, although it occasions damage to an individual, yet an action will lie for doing that which the legislature has authorised if it be done negligently (*h*). (3) "Where the terms of the statute are not imperative, but permissive, when it is left to the discretion of the persons empowered to determine whether the general power committed to them shall be put into execution or not, I think the fair inference is that the legislature intended that discretion to be exercised in strict conformity with private rights, and did not intend to confer licence to commit nuisance in any place which might be selected for the purpose" (*i*).

Liability of Lessor and Lessee for Nuisance. — Where a house or other building is a nuisance, it is sometimes a nice question whether the landlord or the

(*f*) *Metropolitan Asylum District v. Hill*, 6 App. Cas. 193, 211.

(*g*) *Ibid.*; *Hammersmith Railway Company v. Brand*, L. R. 4 H. of L. 171, 215.

(*h*) *Geddis v. Proprietors of Bann Reservoir*, 3 App. Cas. 430, 455.

(*i*) Per Lord Watson, *Metropolitan Asylum District v. Hill*, *ubi supra*, at p. 213 (erection of small-pox hospital).

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Landlord,
when liable.

tenant is the person answerable for such nuisance. If the landlord lets the premises when the nuisance exists, and the damage happens afterwards through no fault of the tenant, to a person to whom the landlord owes a duty, *e.g.*, one of the public using the highway near the house, or a next-door neighbour, the landlord will be liable (*k*). The ground of the decision in *Todd v. Flight* has been stated to be that the landlord did an act authorising the continuance of the nuisance—namely, letting the premises when he knew them to be in a dangerous state. Again, where a landlord let the offices of a building in the City to various tenants, the staircase remaining in his own possession and control, he was held liable to A., who, having occasion to visit one of the tenants on business, sustained personal injuries owing to the defective state of the staircase (*l*). But to make the landlord liable he must owe a duty to the injured person. Thus, where a landlord let an unfurnished house to A., it being in a bad state of repair, and there being no agreement as to the repairs, and afterwards B., who was doing certain work for A., was injured by reason of the defective state of the house, it was held that in the absence of contract the landlord owed no duty to A. or to those whom he brought into the house, and that B. could not recover damages in an action against the landlord (*m*). There the relation between the landlord and the tenant was one of contract, and the contract imposed no duty to repair. If the landlord lets the premises to a tenant who covenants to keep them in repair, the landlord cannot be said to authorise the continuance of the

Tenant, when
liable.

(*k*) *Todd v. Flight*, 9 C. B. N. S. 377; *cf. Lane v. Cox* (1897), 1 Q. B. 415; see also *Gandy v. Jubber*, 5 B. & S. 485, 9 B. & S. 15; *Winter v. Baker*, 3 T. L. R. 569. In the case of a weekly tenancy the landlord will not be considered to re-let the premises every week, some notice to determine such a tenancy being necessary: *Bowen v. Anderson* (1894), 1 Q. B. 164, overruling on this point *Sandford v. Clarke*, 21 Q. B. D. 398.

(*l*) *Miller v. Hancock* (1893), 2 Q. B. 177.

(*m*) *Lane v. Cox* (1897), 1 Q. B. 415.

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nuisance, and he will not be liable for damages resulting from it, but the tenant will (*n*). Possibly, indeed, if the landlord at the time of the demise knew of the defect and did nothing to remedy it, he may be liable also, to one to whom he owes a duty; but it would seem that if the burden of repair is cast upon the tenant, the duty of the landlord ceases (*o*). The tenant as a general rule is the person *primâ facie* liable (*p*).

Waste—
voluntary,
permissive, or
equitable.

Waste.—Waste may be defined to be the committing of any destruction in houses or lands by a tenant for life or for years to the damage of the heir or of him in reversion or remainder (*q*). It may be voluntary or permissive, or, thirdly, may be what is known in modern times as equitable. Voluntary waste may be committed by pulling down or prostrating houses, or cutting down timber trees, or by acts of a similar kind; permissive waste is suffering houses to be unroofed or otherwise to fall into decay. It has been laid down as a general rule that the law will not allow that to be waste which is not in any way prejudicial to the inheritance (*q*), and if a jury give merely nominal damages in an action for waste, judgment will be entered for the defendant (*r*); and so the erection of buildings which improve the value of land is not waste. But waste may be committed by changing the character of the property or destroying evidence of the owner's title (*s*)—*e.g.*, by the conversion of a brewery bringing in £120 a year into other houses let for £200 a year (*t*). Again, waste may be committed by the conversion of arable land into wood land, or *vice versâ*, or by the conversion of meadow land into

(*n*) *Pretty v. Bickmore*, L. R. 8 C. P. 401.

(*o*) *Gwinnell v. Eamer*, L. R. 10 C. P. 658.

(*p*) *Ibid.*; and *Nelson v. Liverpool Brewery Company*, 2 C. P. D. 311.

(*q*) See Bacon's Abridgement, *sub nom.*; see also *Meux v. Cobley* (1892), 2 Ch. 253.

(*r*) *Doherty v. Allman*, 3 App. Cas. 709.

(*s*) *Jones v. Chappell*, L. R. 20 Eq. 539.

(*t*) *Cole v. Greene*, 1 Lev. 309.

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arable, or by the cutting down of timber, or by digging for gravel, lime, clay, brick-earth, or stone, except in places already open, or by opening new mines (*u*). Timber means oak, ash, and elm twenty years old or upwards, provided they are not too old to be usable; but by special custom other trees may be timber in particular localities, such as beeches in Buckinghamshire and birches in Berkshire (*x*). It is now provided by the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 35, sub-s. 1, that where a tenant for life is impeachable for waste in respect of timber, and there is on the settled land timber ripe and fit for cutting, he may, on obtaining the consent of the trustees of the settlement or an order of the Court, cut and sell that timber or any part of it. Of the net proceeds of the sale three-fourths are to be set aside as capital money arising under the Act, and the other fourth part is to go as rents and profits.

The Settled
Land Act,
1882.

If a tenant for life is expressly made not impeachable for waste, he may cut down timber in a husband-like manner for his own use, and commit other waste (*y*); but he may not do acts which will destroy the estate—for example, pull down the family mansion, or cut down avenues or ornamental timber, or young trees not fit for timber, which acts are termed *equitable waste*, for the Court of Chancery, administering equity, restrained such acts (*z*). The Judicature Act, 1873 (36 & 37 Vict. c. 66), by s. 25, sub-s. 3, now expressly provides that “an estate for life without impeachment for waste shall not confer, or be deemed to have conferred, upon the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right shall

(*u*) Bacon's Abridgement, *ubi supra*.

(*x*) *Ibid.*; *Honywood v. Honywood*, L. R. 18 Eq. 306; see *Dashwood v. Magniac* (1891), 3 Ch. 306.

(*y*) 2 Blackstone's Commentaries, 283; *Lewis Bowle's case*, 11 Rep. 79 (b).

(*z*) Blackstone, *ubi supra*; *Vane v. Barnard*, or *Parnard*, 2 Vern. 738; *Downshire v. Sandys*, 6 Ves. 107.

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expressly appear by the instrument creating such estate." But a tenant for life without impeachment for waste may cut and sell ornamental timber which is injuring and hindering the growth of other ornamental timber (*a*).

Law as to
permissive
waste.

With regard to *permissive* waste it has been held that an action does not lie for such waste against a tenant at will who has not covenanted to repair (*b*), nor against a tenant from year to year (*c*), nor against a tenant for life who is not bound by the instrument creating the estate to repair (*d*). According to a recent decision a tenant for years is liable for permissive waste (*e*), but in view of the conflicting state of the authorities the point cannot be considered as clear (*f*).

But a Court of equity will not, in the exercise of its discretionary jurisdiction, interfere to prevent by injunction permissive waste, but will leave the party aggrieved to his remedy at law (*g*); nor will it grant an injunction against meliorating or improving waste—for example, building a valuable house on the land (*h*).

Trespass to Personalty.—An injury to the personal property of another is actionable, and where the property is destroyed, or the owner is wrongfully deprived of its possession, it is said to be "converted to the use" of the wrongdoer, in which case an action will lie for damages, or for the return of the property with damages for its detention. Such actions were

(*a*) *Baker v. Sebright*, 13 Ch. D. 179.

(*b*) *Harnett v. Maitland*, 16 M. & W. 257.

(*c*) *Torriano v. Young*, 6 C. & P. 8.

(*d*) See and *cf.* *Woodhouse v. Walker*, 5 Q. B. D. 404; *Phillips v. Homfray*, 24 Ch. D. 439, at p. 455; *In re Cartwright, Avis v. Newman*, 41 Ch. D. 532.

(*e*) *Davies v. Davies*, 38 Ch. D. 499.

(*f*) See and *cf.* *Yellowly v. Gower*, 11 Ex. 274, 294; *Torriano v. Young*, *supra*; *Herne v. Bembow*, 4 Taun. 764; notes to *Green v. Cole*, 2 Wms. Saunders 252; *Woodhouse v. Walker*, 5 Q. B. D. 404; *In re Cartwright*, *supra*.

(*g*) *Powys v. Blgrave*, 4 D. G. M. & G. 448.

(*h*) *Doherty v. Allman*, 3 App. Cas. 709.

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Trover and
conversion.

formerly known as actions of Trover and actions of Detinue. The gist of the action of trover was that the defendant had "converted to his own use, or to the use of some one other than the plaintiff (*i*), or wrongfully deprived the plaintiff of his personal chattels (*k*). To maintain such an action the plaintiff should have a right of property in the thing converted, and also a right of possession (*l*). It is not, however, necessary that the plaintiff should have a right of general property in the chattels. Thus, a bailee who has a special property in the chattels bailed to him may maintain an action of trover against a person who wrongfully deprives him of the possession of them (*m*); and if the bailment be of such a kind as not to exclude the absolute owner's (*i.e.*, the bailor's) right to the immediate possession, either the bailor or the bailee may bring the action (*n*). Again, the bailor of a chattel which is out on hire for an unexpired term, though he has not the right to the immediate possession of the chattel, may maintain an action against a third person for any *permanent injury* thereto (*o*). Moreover, the finder of a lost chattel, though he does not by such finding acquire an absolute property or ownership in the chattel, has such a property in it as will enable him to keep it against all the world but the rightful owner, and consequently he may maintain an

(*i*) *Shipwick v. Blanchard*, 6 T. R. 298; *Fouldes v. Willoughby*, 8 M. & W. at p. 257.

(*k*) *Hiorl v. Bott*, L. R. 9 Ex. 86, at p. 89.

(*l*) *Gordon v. Harper*, 7 T. R. 9.

(*m*) *Sutton v. Buck*, 2 Taunt. 302.

(*n*) *Nicolls v. Bastard*, 2 C. M. & R. 659.

(*o*) *Mears v. London and South-Western Railway Company*, 11 C. B. N. S. 850; *cf.*, however, *Coupe Company v. Maddick* (1891), 2 Q. B. 413, where it was held by Cave and Charles, JJ., that the letter of a horse and carriage, which were damaged by the negligence of the hirer's servant, had no right of action against the latter. It is respectfully submitted that this judgment, or rather dictum, may require re-consideration. It was also held that the hirer was answerable for the damage caused by his servant, though the servant was not at the time acting in the course of his employment as servant. But is not this extending the obligation of a bailee for hire, which is, that he use *ordinary* care? *Coggs v. Bernard*, 1 Sm. L. C.; see an article hereon, *Law Mag. and Rev.*, vol. 17, p. 97; see also *Storey v. Ashton*, L. R. 4 Q. B. 476, *post*, p. 197.

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Wrongdoer
cannot set up
jus tertii.

action of trover against any person who wrongfully takes it from him. Thus, in a well-known case (*p*) a chimney-sweeper's boy found a jewel, which he carried to the shop of a goldsmith; an apprentice, under pretence of weighing it, took out the stones, and telling his master that it came to three-halfpence, the master offered that sum to the boy; this the boy refused to take, and insisted upon the return of the jewel, which was handed back to him without the stones. In an action of trover against the master for the return of the stones, the plaintiff was held entitled to succeed, and the master was not permitted to set up in his defence the right of the true owner, bare possession being a sufficient title against a mere wrongdoer.

(*p*) *Armory v. Delamirie*, 1 Sm. L. C. 385.

CHAPTER VI.

NEGLIGENCE.

JUST as each man must use his own property in such a way as not to do any damage to his neighbour's, so it is the duty of every one to use such care in his daily life and in the conduct of his business as an ordinarily careful man would use in order to avoid doing harm to, or bringing loss upon, another person. The omission to use such care may render him liable to an action for negligence. Negligence has been defined to be "the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do" (a). "There is no absolute or intrinsic negligence; it is always relative to some circumstances of time, place, or person. It is not negligent or wrong for a man to fire at a mark in his own grounds at a distance from others, or to ride very rapidly in his own park; but it is wrong so to fire near to, and so to ride on, the public highway; and though the quality of the act is not altered, it is wrong in whoever does it, and so far it is as though it were intrinsically wrong" (b).

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It is obvious that no man can complain of the omission by another to shew the care of an ordinarily prudent man, except he has thereby been damaged.

It is also clear that no action will lie for such want of care if the damage sustained be too remote; in other

Negligence must be proximate cause of damage.

(a) *Blyth v. Birmingham Waterworks Company*, 11 Ex. 781; *Smith v. London and South-Western Railway Company*, L. R. 5 C. P. 98.

(b) Per Bramwell, B., in *Degg v. Midland Railway Company*, 1 H. & N. 773, 781.

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words, negligence, to render a person liable, must be the *causa causans* or the proximate cause of the injury, and not merely a *causa sine quâ non* (c). As Lord Cairns puts it in *Metropolitan Railway Company v. Jackson* (d): "The negligence must in some way connect itself, or be connected by evidence with the accident. It must be, if I might invent an expression founded upon a phrase in the civil law, *incuria dans locum injuriæ*." To illustrate this: The door of a carriage in which the plaintiff was being carried as a passenger on the defendants' railway flew open several times through the negligence of the defendants. There was room in the carriage for the plaintiff to sit away from the door, and the train would have stopped at a station in three minutes. The plaintiff shut the door three times. The door opened again, and the plaintiff in endeavouring to shut it for the fourth time, fell out of the train and was injured. The train stopped at three stations between the time when the door first flew open and the occurrence of the accident. In this state of facts the Court held that the defendants, though undoubtedly guilty of negligence, and though but for their negligence the accident would never have happened, were not liable to the plaintiff, for that their negligence was not the immediate nor the efficient cause of the accident, that cause being the act of the plaintiff in trying to shut the door and resting a part of his body against it. If the negligence of the defendants had necessitated the act of the plaintiff, then he might have succeeded, but it was not so, as he might simply have taken a seat in another part of the compartment. The rule on this point is well laid down in the judgment of Montague Smith, J.: "If the negligence of a railway company puts a passenger in a situation of alternative danger: that is to say, if he will be in danger by remaining still, and in danger

(c) *Bailiffs of Romney Marsh v. Trinity House*, L. R. 5 Ex. 204, Ex. 247.

(d) 3 App. Cas. 193, at p. 198.

if he attempts to escape, then, if he attempts to escape, any injury that he may sustain in so doing is a consequence of the company's negligence; but if he is only suffering some inconvenience, and, to avoid that, he voluntarily runs into danger, and injury ensues, that cannot be said to be the result of the company's negligence. It is hardly necessary to say that, though I use the words 'danger' and 'inconvenience,' yet, if the inconvenience is very great, and the danger run in avoiding it very slight, it may not be unreasonable to incur that danger" (e). These remarks should be read in the light of the subsequent case of *Gee v. Metropolitan Railway Company* (f), where the plaintiff recovered damages for injuries received, the facts being that he was leaning against the door of his compartment, and fell out owing to the door suddenly flying open. There the plaintiff was justified in concluding that the railway porters had done their duty by fastening the door.

There are many cases in which, as has already been explained, under the same circumstances and facts, an action for breach of contract or an action in the nature of an action for tort—e.g., for negligence—may indifferently be brought (g).

Breach of contract involving breach of duty.

Thus, if a solicitor be employed to defend an action, he impliedly contracts that he will use ordinary care, skill, and diligence in so doing, and if he fail to do so, he may be sued for a breach of his contract; but under the same circumstances, if he has been negligent in defending the action, he may be sued for the breach of his duty to his client to use such care, skill, and diligence (h).

Whom to sue.—Difficult questions arise as to who may properly be parties to an action where a contract

(e) *Adams v. Lancashire and Yorkshire Railway Company*, L. R. 4 C. P. 739, at p. 742; see also *Lee v. Nixey*, 63 L. T. 285.

(f) L. R. 8 Q. B. 161.

(g) *Brown v. Boorman*, 11 C. & F. 1; *ante*, p. 56.

(h) See *Hoby v. Buitt*, 3 B. & Ad. 350; *Godefroy v. Jay*, 7 Bing. 413.

CHAP. VI. has been entered into and some misfeasance has occurred in the course of the carrying out of that contract. In the first place, it is clear that one party to the contract may in certain cases sue the other party for a breach of contract, and in the same facts and circumstances sue a third party for a tort. Thus, in *Dalyell v. Tyrer* (i) the plaintiff had made a contract with a public ferryman under which the latter was bound to carry him daily for a certain period; the ferryman, being unable upon a particular day to work the ferry, hired of the defendant a boat and crew for the purpose, and, an accident having occurred to the plaintiff through the mismanagement of a rope by the crew, it was held that the plaintiff was entitled to sue the defendant, for that he was lawfully upon the defendant's boat with his consent as a passenger, and it was the duty of the defendant to navigate his boat with reasonable care. This authority was recognized in the later case of *Foulkes v. Metropolitan District Railway Company* (k). In that case the defendants had running powers between Hammersmith, a station on their own line, and Richmond, a station on the London and South-Western Company's line. The plaintiff took a ticket from Richmond to Hammersmith and back, which was issued to him by a clerk of the London and South-Western Company. On his return journey he travelled in a train belonging to the defendants and driven by their servants. Owing to the carriage in which the plaintiff was being unsuited to the Richmond platform, the plaintiff fell on alighting, and was injured. The Court of Appeal, affirming the decision of the Court below, and without deciding whether there was any contract of carriage between the plaintiff and the defendants, held (the jury having found that the defendants were guilty of negligence) that the defendants were liable to the plaintiff. As they had received him as a passenger, it was their duty to take

(i) E. B. & E. 899.

(k) 4 C. P. D. 267; 5 C. P. D. 157; followed in *Hooper v. London and North-Western Railway Company*, 50 L. J. Q. B. 103.

reasonable care not to expose him to danger, and for that purpose they should either have adapted the foot-board of their carriage to the platform, or have arranged for an alteration to be made in the platform itself. Lopes, J., in the course of his judgment in the Court below, says: "Take this illustration: Railway A. issues tickets for Railway A. and Railway B. The traffic is sometimes worked by carriages and servants belonging to Railway A. and sometimes by carriages and servants belonging to Railway B. A passenger takes a ticket from Railway A. and gets into a carriage belonging to Railway B., drawn by Railway B.'s engines and manned by Railway B.'s servants. The passenger traverses some portion of Railway B.'s line; an accident is caused by the negligence of Railway B.'s servants, and through some defect in Railway B.'s carriages not being properly adapted to the exigencies of the traffic. Now, although not necessary perhaps to go that length for the decision of this case, I think that according to the authorities the passenger could sue either Railway A. or Railway B. He could sue Railway A. on the contract arising from the ticket issued by the company to carry him the whole distance with reasonable care or caution, or he could sue Railway B. as the immediate authors of the negligence, on the implied contract or undertaking which would arise from his having been received into the carriage, or from his having been invited to go into the carriage, of Railway B., and become a passenger on the railway."

Secondly, the same facts and circumstances may render A. liable to B. for a breach of contract, and to C. for a tort.

Thus, in *Marshall v. York, Newcastle, and Berwick Railway Company* (l) the plaintiff and his master travelled by the defendants' railway from Darlington

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to London. The master took and paid for tickets for himself and the plaintiff. The plaintiff's luggage was lost through the default of the defendants, and it was held that they were liable to him in an action brought in his own name. The Court did not think it necessary in this case to decide whether any contract had been made between the plaintiff and the defendants or not, but held that the defendants were liable to him, on the ground that there was a duty incumbent upon them, he being a passenger, to carry him and his luggage safely. As a contract had been made with the master, it seems clear that he also might have sued the company for damages naturally resulting from the breach of it. Again, in *Austin v. Great Western Railway Company* (m) the plaintiff's mother, carrying in her arms the plaintiff, aged three years and two months, which was slightly in excess of the age at which children are entitled to be carried free, took a ticket for herself on the defendants' railway, but did not take one for the child. In the course of the journey the plaintiff was injured through the negligence of the defendants' servants. The mother had not been asked the age of the child, and had no intention to defraud the defendants. These facts were held to give the plaintiff a good cause of action against the defendants—by Cockburn, C.J., and Shee and Lush, J.J., on the ground that there was one entire contract to carry the mother and child, and by Blackburn, J., because the child, without fault, and through an honest mistake on the mother's part, was taken into the train by the defendants' servants and received as a passenger, and thereupon a duty was imposed upon them that they should take reasonable care to carry him safely (n).

(m) L. R. 2 Q. B. 442.

(n) There being a duty to take reasonable care to carry safely a person received as a passenger, it may be doubted if *Alton v. Midland Railway Company*, 19 C. B. N. S. 213, cited *ante*, p. 65, lays down the law correctly, though the actual decision in that case may have been quite right. An action by a passenger against a railway company in respect of injuries caused by the negligence of the company's servants, is, though the passenger has taken a ticket, an action of *tort* within s. 116 of the

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But who are the persons entitled to sue on the ground that there has been a breach of duty by another towards them? In the case of railway companies and innkeepers, who receive persons into their trains or hotels, there is plainly a duty to use due care in protecting the lives of such persons, by whomsoever the contract has been made. But it is not clear in general in what cases a person who is a stranger to a contract between A. and B., and who is injured through the misfeasance of one of the contracting parties by something which has occurred in connection with the carrying out of the contract, is entitled to sue. In the case of *Heaven v. Pender* (o) a proposition of law on this point was laid down in very wide terms by Brett, M.R. (now Lord Esher), but the learned Lords Justices (Cotton and Bowen) did not assent to it. In that case the defendant, a dock-owner, let out the dock for the repair of ships, and provided for use in the dock the staging necessary for the painting of the outside of ships. Under a contract with a ship-owner, he supplied and put up such staging outside a ship in his dock. The plaintiff was a workman in the employment of a ship-painter who had contracted with the ship-owner to paint the outside of the ship, and in order to do the painting the plaintiff went on the staging and used it. Whilst he was so there, one of the ropes by which the staging was slung, being unfit for use when supplied by the defendant, broke, and, by reason thereof, the plaintiff fell into the dock and was injured. That the staging was, through the neglect of the defendant's servants to use ordinary care, supplied in a state unsafe for use, was not denied; but the question was whether the defendant, the dock-owner, owed any duty to the plaintiff to use ordinary care to see that the

Where stranger to contract is injured by misfeasance of contracting party.

County Courts Act, 1888, so that where such a plaintiff recovered £20 damages in the High Court he was allowed High Court costs, whereas had the action been one of contract County Court costs only would have been allowed; see and *cf. Taylor v. Manchester, Sheffield, and Lincolnshire Railway Company* (1895), 1 Q. B. 134; *Kelly v. Metropolitan Railway Company* (1895), 1 Q. B. 944; *Turner v. Stallibrass* (1898), 1 Q. B. 56. (o) 11 Q. B. D. 503.

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staging was reasonably secure. On this point the observations of Brett, M.R., are well worthy of attention, and as to the first part of them there is no question. He says, at p. 507: "Want of attention amounting to a want of ordinary care is not a good cause of action, although injury ensue from such want, unless the person charged with such want of ordinary care had a duty to the person complaining to use ordinary care in respect of the matter called in question. Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff, without contributory negligence on his part, has suffered injury to his person or property. The question in this case is whether the defendant owed such a duty to the plaintiff.

"If a person contracts with another to use ordinary care or skill towards him or his property, the obligation need not be considered in the light of a duty: it is an obligation of contract. It is undoubted, however, that there may be the obligation of such a duty from one person to another, although there is no contract between them with regard to such duty. Two drivers meeting have no contract with each other, but under certain circumstances they have a reciprocal duty towards each other. So two ships navigating the sea. So a railway company which has contracted with one person to carry another has no contract with the person carried, but has a duty towards that person. So the owner or occupier of a house or land who permits a person or persons to come to his house or land has no contract with such person or persons, but has a duty towards him or them. It should be observed that the existence of a contract between two persons does not prevent the existence of the suggested duty between them being also raised by law independently of the contract, by the facts with regard to which the contract is made, and to which it applies an exactly similar but a contract duty."

His lordship then mentioned a few of the instances in which there is such a duty raised by law. There is such a duty in the case of two drivers or two ships coming from opposite directions. So is there in the case of a railway company carrying a passenger with whom they have entered into no contract, and in the case of a person who opens a shop, thus impliedly inviting the public to enter and buy such articles as they require (*p*). But is there any large proposition which will cover all these and similar cases? The Master of the Rolls thinks that there is, and that the proposition which the cases suggest is this: that "whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger" (*q*). Under this proposition, according to his lordship, would come the case of goods, &c., supplied to be used immediately by a particular person or persons, or one of a class of persons, where it would be obvious to the person supplying, if he thought at all, that the goods would in all probability be used at once by such persons before there could be a reasonable opportunity for discovering any defect which might exist, and where the thing supplied would be of such a nature that a neglect of ordinary care or skill as to its condition or the manner of supplying it would probably cause danger to the person or property of the person for whose use it was supplied, and who was about to use it. But it would exclude the case in which the goods are supplied under circumstances in which it would be a *chance* by whom they would be used, or whether they would be used or not, or whether they would be

(*p*) See *Indermaur v. Dames*, L. R. 1 C. P. 274, 2 C. P. 311.

(*q*) 11 Q. B. D., at p. 509.

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used before there would probably be means of observing any defect, or where the goods would be of such a nature that a want of care or skill as to their condition, or the manner of supplying them, would not probably produce danger of injury to person or property. Lords Justices Cotton and Bowen declined to concur in the proposition laid down by the learned Master of the Rolls, but held, as he did, that the defendant was liable to the plaintiff for the injuries he had sustained; but the ground of such liability, in their view, was that the defendant being a person who received ships into his dock for the purpose of repairs, and provided them with staging for the work to be executed upon them, all who came for the purpose of repairing or painting the ships were there for a business in which the defendant was interested, and must be considered as having been invited by the defendant to use the dock and all appliances provided by him as incident to the use of the dock. This, it will be remembered, was in substance the ground on which the case of *Indermaur v. Dames* (r) was decided in favour of the plaintiff.

It is certainly not easy to reconcile the proposition of law laid down by the Master of the Rolls with the judgment in the older case of *Winterbottom v. Wright* (s). In that case the plaintiff was a coachman in the employment of certain persons who had contracted with the Postmaster-General to convey the mail-coach along a certain line of route, and to supply horses and coachmen for that purpose. The defendant had contracted with the Postmaster-General to supply the mail-coach, and to keep it in a proper state of repair. The coach, it was alleged, through some latent defects, became unsafe, and by its breaking down the plaintiff was seriously injured. The Court of Exchequer held that the plaintiff was not entitled

(r) *Ubi supra.*

(s) 10 M. & W. 109. See now the cases cited on p. 105, *post*.

to recover, Lord Abinger saying, "Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue." The explanation given of this case by Brett, M.R., is that it was decided on what was equivalent to a general demurrer to the declaration, and that the declaration did not shew that the defendant, if he had thought about it, must have known, or ought to have known, that the coach would be necessarily or probably driven by the plaintiff, or by any class of which he could be said to be one, or that it would be so driven within any time which would make it probable that the defect would not be observed. The declaration, moreover, relied too much on contracts entered into with other persons than the plaintiff. Perhaps it may also be said that the declaration, when closely examined, does not clearly allege that the defendant was negligent in supplying the coach, or knew of its defects. The judgment of Brett, M.R., should be carefully read where his lordship explains how the previous cases may be brought under, or are not inconsistent with, the proposition laid down by him. As will be seen, the judgment of Lords Justices Cotton and Bowen was founded on the "doctrine of invitation," as it may be called, which will be dealt with presently.

It should be mentioned that the dictum of Brett, M.R., was approved by Hawkins, J., in a later case (*t*), but attempts having been made to give too wide an operation to the decision in *Heaven v. Pender*, it has recently been pointed out by the Court of Appeal that all that that case decided was that a duty to take care arises when the person or property of one is in such proximity to the person or property of another that, if

(*t*) *Thrussell v. Handyside*, 20 Q. B. D. 359; see also *Elliott v. Hall*, 15 Q. B. D. 315; *The Moorcock*, 13 P. D. 157; 14 P. D. 64; *The Calliope* (1891), App. Cas. 11; and the earlier case of *Parry v. Smith*, 4 C. P. D. 325. Cf. *Caledonian Ry. Co. v. Mulholland* (1898), App. Cas. 216.

CHAP. VI. due care be not taken, damage may be done by the one to the other (*u*). For instance, mere negligent misrepresentation by A., on which B. acts to his prejudice, will not give B. a cause of action against A., where A. owes no duty towards B. A surveyor appointed by a building owner to give certificates as the building progressed, gave certificates which were inaccurate, but on the faith of which certain mortgagees advanced moneys to the builder which they would not have advanced but for the certificates, and were thereby damnified. There was, however, no contractual relation between the mortgagees and the surveyor, and so it was held that he owed no duty to them to exercise care in giving certificates, and was not liable to them in damages. Again, as mere negligent misrepresentation is not fraud, an action of deceit or fraud would not lie against him (*x*).

The doctrine
of "invitation."

In the well-known case of *Indermaur v. Dames* (*y*), above referred to, it was, in substance, laid down that all persons who go to the premises of another, not as mere volunteers, or licensees, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns that other person, and upon his invitation, express or implied, are entitled to expect that, using reasonable care on their own part for their own safety, he will on his part use reasonable care to prevent damage from unusual danger which he knows, or ought to know. But it is otherwise in the case of persons who are not "invited" in

(*u*) *Le Lievre v. Gould* (1893), 1 Q. B. 491, overruling *Cann v. Willson*, 39 Ch. D. 39, and approving *Scholes v. Brook*, 63 L. T. 837.

(*x*) *Le Lievre v. Gould*, *supra*. See also and *cf.* *Scholfield v. Londesborough* (1896), App. Cas. 514. As to action for deceit or fraud, see *post*, chap. vii.

(*y*) L. R. 1 C. P. 274, 2 C. P. 311; see also *post*, p. 120. See also *Lax v. Corporation of Darlington*, where the damage was not to the plaintiff but to his property. The defendants, who were the owners of a market and received the tolls, put up in it some low railings which were dangerous. Plaintiff's cow, in trying to jump them, was spiked, and subsequently died from its injuries. Defendants were held liable for its value.

the sense just mentioned. Thus, a bare licensee cannot make the licensor responsible because he has sustained some injury through a defect in the premises upon which he is licensed to go. He must, in fact, take them as he finds them (z). But if there is anything amounting to fraud in the conduct of the licensor (z), or if he lays a "trap" for those who may come upon the premises, he may be answerable for injuries caused thereby (a). But in general a licensor is not bound to keep premises in repair for bare licensees. Thus, a mere licence to a lodger to use the leaden roof of a house as a drying-place for his clothes does not impose upon the landlord any duty to keep the railing round the roof in repair (b).

But the owner of premises must not be guilty of active negligence towards a licensee, if he knows that the latter is, or is likely to be, on his premises. He may, for instance, in ordinary circumstances, leave a horse and cart unattended in his own field; but if he knows, that a licensee is or is likely to be there, and that the leaving of the horse and cart unattended may probably cause injury to the licensee, the latter, if injured by the horse running away, may have a right of action (c).

Guests.—A guest stands in the same position as a mere licensee. His host, if he knowingly allows him to fall into some hidden danger, may have to answer for any injuries sustained thereby; but he is not answerable for injuries caused by defects in the construction of premises, or by their being in want of repair. Thus, a guest who, on leaving the house of his host, was cut by a loose pane of glass which fell upon him as he was opening a door, was held to have no good cause of action, the reason given being that a guest or person voluntarily entering a house becomes

(z) *Gautret v. Egerton* L. R. 2 C. P. 371.

(a) *Corby v. Hill*, 4 C. B. N. S. 556.

(b) *Ivay v. Hedges*, 9 Q. B. D. 80.

(c) *Tolhausen v. Davies*, 59 L. T. 436; affirmed, 58 L. J. Q. B. 98.

CHAP. VI. an inmate and one of the family *pro hac vice*, and so is precluded from bringing an action (*d*).

Trespassers.—There is still less liability on the part of an occupier of land or a house towards a trespasser, and an action cannot be maintained by a person who, trespassing upon another's land, falls into a pit and thereby sustains injuries (*e*). But there may be a liability where the pit is so near a public highway that a person passing along the highway and using ordinary care falls into it (*f*).

Things in themselves dangerous.—Analogous to the duty laid down in *Heaven v. Pender*, *supra*, there is a duty to use the greatest care when a person has or uses or deals with highly dangerous things, which, unless such care is exercised, are calculated to cause injury to bystanders or others into whose hands they may get (*g*). Thus, a gas-fitter was employed by the plaintiff's master to repair a meter. To do so, he took away the meter replacing it temporarily by a flexible tube which connected the inlet pipe with the others. The plaintiff in the course of his duties went to the cellar with a light, whereupon an explosion took place, and he was injured. The jury found negligence on the part of the gas-fitter, and on these facts the plaintiff was held to have a good cause of action against him (*h*).

This case perhaps goes somewhat further than *George v. Skivington* (*i*), where, in an action by husband and wife, a declaration alleging that the defendant sold to

(*d*) *Southcote v. Stanley*, 1 H. & N. 247.

(*e*) See *Hardcastle v. South Yorkshire Railway Company*, 4 H. & N. 67; *Bolch v. Smith*, 7 H. & N. 736.

(*f*) *Barnes v. Ward*, 9 C. B. 392.

(*g*) See *Longmeid v. Holliday*, 20 L. J. Ex. 430; *Parry v. Smith*, 4 C. P. D. 328; *Scholes v. Brook*, 63 L. T. 837; *Le Lievre v. Gould* (1893), 1 Q. B. 491, 502.

(*h*) *Parry v. Smith*, *supra*.

(*i*) L. R. 5 Ex. 1. This case followed *Langridge v. Levy*, 2 M. & W. 519; 4 M. & W. 337 (a defective gun sold to a father for the use of his son, the plaintiff), there being this difference, that there fraud, and not negligence, was alleged, see *post*, p. 109.

the husband for the use, as the defendant knew, of the wife, a deleterious hairwash, which had been negligently compounded by the defendant, and which had injured the wife, disclosed a good cause of action in her favour. In this case negligence was alleged, and in *Langridge v. Levy* (j), fraud, and in each the person for whom, as the defendant knew, the article was bought, was held to have a right of action. This distinguishes them from such cases as *Longmeid v. Holliday* (k). There, defendant sold to A. for his use and that of his wife, the plaintiff, a lamp which he warranted to be sound, but which was so badly constructed that it exploded and injured the plaintiff. The defendant did not manufacture the lamp, and there was no evidence that he knew of its defects. There being therefore no *malâ fides* or negligence, the plaintiff, who was not a party to the contract, had no cause of action against defendant.

Burden of Proof.—In actions brought for negligence, the burden of proving such negligence rests upon the plaintiff, and “where the evidence is equally consistent—either with the existence or non-existence of negligence—it is not competent to the judge to leave the matter to the jury” (l). Thus, where a man bought a horse at Tattersall’s, and upon the next day took it out for the purpose of trying it, and whilst in Finsbury Circus, a much-frequented thoroughfare, the horse, from some unexplained reason, swerved aside upon the footpath, in spite of the owner’s efforts to hold it in, and killed a man, it was held that these facts disclosed no evidence of negligence which could be submitted to the jury (m). If in this case it had been proved that the defendant was unskilful as a rider, or knew that the horse was vicious or unmanageable, the result might have been different (m).

(j) See note (i), p. 108.

(k) 20 L. J. Ex. 430.

(l) *Cotton v. Wood*, 8 C. B. N. S. 568.

(m) *Hammack v. White*, 11 C. B. N. S. 588.

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The ruling in the case just referred to was upheld in *Manzoni v. Douglas* (n), where also it was held that there was no evidence of negligence to submit to the jury. In that case a horse drawing a brougham, under the care of the defendant's coachman, in a public street in London, suddenly, and without any explainable cause, bolted, and, notwithstanding the efforts of the driver to control him, swerved aside upon the footpath and injured the plaintiff. To hold that the mere fact of a horse bolting is *per se* evidence of negligence was described by the Court as "mere reckless guess-work" (o).

*Res ipsa
loquitur.*

But although a plaintiff is bound to give reasonable evidence of negligence on the part of the defendant, yet there are certain cases of which it may be said *res ipsa loquitur*—that is to say, cases in which the Court would hold that the mere fact of the accident having happened is evidence of negligence. Thus, the fact of a collision between two trains belonging to the same company is *prima facie* some evidence of negligence on the company's part (p). So if a person is walking along the street past a flour-merchant's shop, and a barrel of flour falls upon him from a warehouse over the shop, the fact of its so falling is *prima facie* evidence of negligence, and the person who is injured by it is not bound to call witnesses from the warehouse to prove negligence (q). In *Scott v. London and St. Katherine Dock Company* (r), the plaintiff, an officer of the Customs, whilst in discharge of his duty, was passing in front of a warehouse in the dock, and six bags of sugar fell upon him. The Court, in holding that there was upon these facts sufficient evidence of negligence

(n) 6 Q. B. D. 145.

(o) For other instances of "inevitable accidents" see *Stanley v. Powell* (1891), 1 Q. B. 86; *Peacock v. Nicholson*, 11 T. L. R. 222; cited *ante*, p. 30.

(p) *Skinner v. London, Brighton, and South Coast Railway Company*, 5 Ex. 787.

(q) *Byrne v. Boadle*, 2 H. & C. 722.

(r) 3 H. & C. 596.

to be submitted to the jury, said: "Where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."

Kearney v. London, Brighton, and South Coast Railway Company (s) is another case illustrating the same doctrine. In that case, as the plaintiff was passing along a public road under a railway bridge belonging to the defendants, a brick fell from the top of one of the pilasters on which one of the girders of the bridge rested, and injured the plaintiff. A train had passed over the bridge immediately before the accident. The plaintiff also proved that other bricks had fallen out since the accident. The Court of Exchequer Chamber, affirming the judgment of the Court of Queen's Bench, held that these facts afforded *prima facie* evidence of negligence on the part of the defendants, because, if a bridge is kept in proper repair, a brick does not, in the ordinary course of events, fall suddenly out. In the Court below Cockburn, C.J., said: "My own opinion is that this is a case to which the principle *res ipsa loquitur* is applicable, though it is certainly as weak a case as can well be conceived in which that maxim could be taken to apply. But I think the maxim is applicable, and my reason for saying so is this:—The company who have constructed this bridge were bound to construct it in a proper manner, and to use all reasonable care and diligence in keeping it in such a state of repair that no damage from its defective condition should occur to those who passed under it, the public having a right to pass under it. Now, we have the fact that a brick falls out of the structure, and injures the plaintiff. The proximate cause appears to have

(s) L. R. 5 Q. B. 411, 6 Q. B. 759.

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been the looseness of the brick, and the vibration of a train passing over the bridge acting upon the defective condition of the brick. It is clear, therefore, that the structure in reference to this brick was out of repair. It is clear that it was incumbent on the defendants to use reasonable care and diligence, and I think the brick being loose affords *prima facie* a presumption that they had not used reasonable care and diligence. It is true that it is possible that, from changes in the temperature, a brick might get into the condition in which this brickwork appears to have been, from causes operating so speedily as to prevent the possibility of any diligence and care applied to such a purpose intervening in due time so as to prevent an accident. But, inasmuch as our experience of these things is that bricks do not fall out when brickwork is kept in a proper state of repair, I think, where an accident of this sort happens, the presumption is that it is not the frost of a single night, or of many nights, that would cause such a change in the state of this brickwork as that a brick would fall out in this way; and it must be presumed that there was not that inspection and that care on the part of the defendants which it was their duty to apply. On the other hand, I admit most readily that a very little evidence would have sufficed to rebut the presumption which arises from the manifestly defective state of this brickwork."

Burden of Proof as to Contributory Negligence.—As will appear hereafter, a plaintiff's contributory negligence may under certain circumstances be a good defence to an action for negligence brought by him. Suffice it to say, at present, that the onus of proving affirmatively that there was contributory negligence on the part of the plaintiff rests, in the first instance, upon the defendant, and, in the absence of evidence tending to that conclusion, the plaintiff is not bound to prove the negative; but cases may occur in which, contributory negligence being admitted by a plaintiff, or proved by his witnesses whilst establishing negligence against a

defendant, there will be nothing left for the jury to decide, there being no contest of fact (*t*). Thus a railway company complied with the statutory duty of erecting hand-gates where the line crossed on the level a public footpath. The dead body of a man was found on the line near the crossing. It was admitted that he was struck by the engine, but there was nothing to shew whether he negligently ran against it, or whether the company's servants negligently ran him down: held, that, even assuming negligence on the part of the company's servants, there was no evidence that it led to the man's death (*t*). But there was evidence of negligence for a jury where a child at a similar crossing was found with its foot cut off by a passing train, it being shewn that the railway company had not complied with their statutory duty of erecting gates which would have served as a warning to those about to cross the line (*u*). And there was evidence for the jury in a later case where a man was killed by a train at a spot where the line crossed a highway protected with gates, as the deceased might be held justified in assuming that it was safe to cross the line, by reason of the fact that the signalman, to whom he had been speaking, neither warned him of an approaching train, nor left his house to signal it, as he was bound and accustomed to do (*x*).

Functions of the Judge and of the Jury.—"In actions for negligence the judge has a certain duty to discharge, and the jurors have another and a different duty. The judge has to say whether any facts have been established by evidence from which negligence *may* be reasonably inferred, the jurors have to say whether, from those facts, when submitted to them, negligence *ought to be* inferred. . . . It would be a serious inroad on the province of the jury if, in a case where

(*t*) See *Wakelin v. London and South-Western Railway Company*, 12 App. Cas. 41.

(*u*) *Williams v. Great Western Railway Company*, L. R. 9 Ex. 157.

(*x*) *Smith v. South-Eastern Railway Company* (1896), 1 Q. B. 178.

CHAP. VI. there are facts from which negligence may reasonably be inferred, the judge were to withdraw the case from the jury upon the ground that, in his opinion, negligence ought not to be inferred; and it would, on the other hand, place in the hands of the jurors a power which might be exercised in the most arbitrary manner if they were at liberty to hold that negligence might be inferred from any state of facts whatever" (y).

If there is conflicting evidence on a question of fact, the judge is bound to leave it to the jury, whatever may be his own opinion of the value of that evidence. He may declare negatively that there is no evidence to go to the jury, but not affirmatively that a certain issue is proved: *Dublin, Wicklow, and Wexford Railway Company v. Slattery* (z). In the case just now mentioned the husband of the respondent, the plaintiff in the action, attempted to cross the line of the railway company at night, at a spot where persons were in the habit of crossing it with the acquiescence of the company. At the time when he attempted to cross it, there was a train standing still on the up line in such a position as to prevent a person on the line behind it from seeing anything approaching on the down line. The respondent's husband came from behind the train on the up line, and, on passing on to the down rails, was struck by an express train, and killed. It was proved that it was the duty of the drivers of express trains on the company's line to whistle on passing every station. Two or three witnesses for the plaintiff gave evidence that they did not hear the whistle, but the engine-driver, and other witnesses to the number of ten, stated positively that whistling did take place. It was also proved that the train carried lights, and might have been seen by the deceased before he passed on to the down line. Upon this evidence the House

(y) *Metropolitan Railway Company v. Jackson*, 3 App. Cas. 193, per Lord Cairns, at p. 197; see the cases cited *ante*, p. 109.

(z) 3 App. Cas. 1155.

of Lords held that the learned judge at the trial had acted rightly in not withdrawing the case from the jury. "When once a plaintiff has adduced such evidence as, if uncontradicted, would justify and sustain a verdict, no amount of contradictory evidence will justify the withdrawal of the case from the jury" (a).

Miscellaneous Negligence Cases.—A few cases may be cited to shew the application of the principles above laid down. In *Metropolitan Railway Company v. Jackson* (b), already referred to, the facts were shortly these:—The respondent, the plaintiff in the action, was a passenger on the company's railway. The compartment in which he travelled was quite full before the train arrived at Gower Street Station. There three persons forced themselves in, but, there being no seats vacant, they were obliged to remain standing. At the next station, Portland Road, there was a rush of fresh passengers. The door of the compartment in which the plaintiff sat was opened by some persons who looked into it, saw it full, and shut the door. Then others came, opened the door again, and some of them tried to get into the carriage. The plaintiff rose from his seat to prevent them. Whilst he was standing with his hands and arms extended, the train moved forward, and the plaintiff, to save himself from falling, put his hand upon the edge of the door of the carriage. At that moment, the train being about to enter a tunnel, a railway porter came up, pushed away the persons who were trying to get in, and slammed the door to, severely crushing the plaintiff's thumb. Now, here there was no doubt negligence on the part of the company's servants in allowing more passengers than the proper number to get in at Gower Street Station; and it may have been also negligence, if they saw these supernumerary passengers, or if they ought to have seen them, at Portland Road Station, not to have

*Causa
causans.*

(a) Per Lord Hatherley, who dissented from the majority of the Lords, but not on this point (p. 1168).

(b) 3 App. Cas. 193.

CHAP. VI. removed them. But the evidence did not shew that the overcrowding had any effect on the movements of the plaintiff, or made him less a master of his actions when he stood up or when he fell forward. The porter had only done his duty in shutting the door as the train was approaching the tunnel, and it was not those *inside* who had opened it, but those *outside* who were trying to get in. Accordingly, the House of Lords held that no negligence connected—that is, connected proximately—with the accident had been proved, and that the learned judge at the trial ought to have withdrawn the case from the jury, or, in other words, that the negligence of the company was not the *causa causans* of the accident.

In the recent case of *Cobb v. Great Western Railway Company (c)*, the plaintiff, a passenger, claimed to recover from the defendants a sum of money of which he had been robbed, owing, as he alleged, to the defendants' negligence in allowing the carriage in which he travelled to be overcrowded. Negligence there was, no doubt, in permitting the overcrowding, but it was held that the action must fail because it was not the ordinary or probable result of such negligence that a passenger should be robbed.

In the same case an allegation in the statement of claim which in substance came to this—that the defendants after the plaintiff had been robbed refused to detain the train until he had complained to the police, and his complaint had been inquired into by them—was held to disclose no cause of action; though one may gather from the judgments that the decision would have been otherwise if there had been a specific allegation that the plaintiff was ready to give certain persons into the custody of the police, who were on the spot and ready to deal with the charge of robbery and take such persons into custody, but that he was prevented from doing so by the defendants.

(c) (1893), 1 Q. B. 459; in H. of L. (1894), App. Cas. 419.

It is unfortunate that the decision turned, to some extent at least, on a point of pleading, but so far as it goes it throws some doubt on the correctness of the judgment in *Pounder v. North-Eastern Railway Company (d)*, delivered a few months previously. In that case, the plaintiff, a passenger on the defendants' railway, was a man who was obnoxious to the pitmen of a certain colliery district. This fact was not known to the defendants at the time he took his ticket, but before the train started he was, in the hearing of the defendants' servants, threatened with violence by a number of pitmen, and was placed by the defendants' servants in a carriage into which several pitmen rushed, greatly overcrowding it. The defendants' servants, though applied to by the plaintiff, did not get the pitmen out or provide another carriage for the plaintiff, and the result was that he was assaulted throughout the whole of his journey, and nothing was done to protect him, though he complained to the guard at each station, and though it would appear that the company's ordinary staff were well able to protect the plaintiff. A Divisional Court (A. L. Smith and Mathew, JJ.), held that the defendants were not liable, as there was no evidence of a breach of duty by the defendants arising out of the contract for carriage: that, in fact, the defendants' duty arose out of the contract, and was to be determined by the facts known to the contracting parties at the time of the contract.

It is submitted, with deference, that the judgment in this case was wrong in resting too much on what was supposed to be in the minds of the parties at the time of the contract. When a railway company receive a passenger they have a duty, apart from any contract, to take reasonable care to convey him safely (e), and it is submitted that they commit a breach

(d) (1892), 1 Q. B. 385.

(e) See and cf. *Marshall v. York, &c., Railway Company*, 21 L. J. C. P. 34; *Alton v. Midland Railway Company*, 19 C. B. N. S. 213; *Taylor v. Manchester, Sheffield, and Lincolnshire Railway Company*

CHAP. VI. of such duty in neglecting, under the circumstances above set forth, to use ordinary and reasonable efforts to provide for the passenger's safety. Indeed Lord Esher, M.R., in *Cobb v. Great Western Railway Company* (*supra*) in deciding against the plaintiff in that case says: "It is not alleged that the plaintiff was being ill-used or assaulted in the train, and that that fact being known to the defendants' servants they did not interfere to protect him. *That would be a different case.*" (*f*).

Damage by
horses.

A horse, owing to its owner's negligence, strayed on to a public highway in which a child was playing, and there kicked and hurt the child. The owner was held not liable; for even if there was any evidence of negligence on the part of the owner in letting his horse stray into the road, this negligence could not be connected with the act of the horse in kicking the child without anything to account for it. The act was not one which an ordinary horse, not of a peculiarly vicious temper, would commit, and the Court thought that, to sustain the action, the plaintiff should have shewn that the owner, the defendant, knew that the horse had committed, or was likely to commit, such an act (*g*).

But where, through the defective state of a gate which the defendant was bound to keep in repair, the defendant's mare strayed from his farm into an occupation road, and thence into the plaintiff's field, where it kicked the plaintiff's horse, the defendant was held liable for the mischief done (*h*). The ground of the distinction would seem to be that the latter of these cases was, in substance, an action for trespass, in respect of which the defendant was clearly liable to the plaintiff, and the only question was as to the remoteness

(1895), 1 Q. B. 134; *Kelly v. Metropolitan Railway Company*, *Ibid.*, 944, *ante*, pp. 100, 101.

(*f*) In the *H. of L.* Lord Selborne questioned Pounder's case, whilst Lord Morris seemed to agree with it.

(*g*) *Cox v. Burbidge*, 13 C. B. N. S. 430.

(*h*) *Lee v. Riley*, 18 C. B. N. S. 722.

of the damage. The accident which occurred was said to be the natural consequence of two horses meeting under the circumstances mentioned, and no question properly arose as to the ferocious temper of the mare or the defendant's knowledge thereof.

This case was followed in *Ellis v. Loftus Iron Company* (i), where, the defendants' horse having injured the plaintiff's mare by biting and kicking her through the fence separating the plaintiff's land from the defendants', it was held that there was a trespass by the act of the defendants' horse for which the defendants were liable, apart from any question of negligence on their part.

To the cases already cited illustrating the principle of *res ipsa loquitur*, the case of *Welfare v. London, Brighton, and South Coast Railway Company* (k) may well be added. There the plaintiff was lawfully on the premises of the railway company, and, having made some inquiries respecting the departure of trains, was directed by a porter of the defendants to look at a time-bill which was posted on the wall of the station underneath a portico. Whilst the plaintiff was engaged in looking at the time-bill, a plank and a roll of zinc suddenly fell down upon him through a hole in the roof of the portico, severely injuring him. Upon looking up, the plaintiff saw the legs of a man protruding through the hole. The plaintiff sued the company for negligence, but was nonsuited, and it was held properly so; for, in the first place, there was nothing to shew that the man on the roof was a servant of the defendants, the presumption being rather that he was the servant of some builder or other contractor who had contracted to repair the roof. In the second place, to the suggestion that there was negligence on the part of the defendants in allowing a person to go on the roof when it was in an insecure condition, or not sufficiently

Res ipsa loquitur not applicable.

(i) L. R. 10 C. P. 10.

(k) L. R. 4 Q. B. 693.

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Structures reasonably safe.—It is difficult to succeed in what virtually may be termed an attempt to convict our predecessors of negligence; and where an article or appliance has been long in general use, it will not be enough, for the purpose of shewing negligence, that another article or appliance of an approved kind might be used. Thus, where a staircase about six feet wide belonging to a railway was nosed with brass, but the brass, from constant use, had become slippery, and the plaintiff slipped upon the stairs and was hurt, it was held that there was no evidence of negligence to go to the jury, although two experts stated that the staircase was dangerous, principally by reason of the nosing of brass, one of them suggesting that lead would be safer (*l*). “We must take that evidence,” says Willes, J., “with the common experience which every one has. We all know that brass is a material which is commonly used for the nosing of stairs in public offices, steamboats on the river, and other places of much resort.” *Longmore v. Great Western Railway Company* (*m*), relied on by the plaintiff, was distinguished, on the ground that there the danger arose from the circumstance of a rail being placed at the side of some steps upon a wooden bridge, which apparently afforded protection to persons using the bridge, but which in reality afforded no protection in the event of an accidental slip, there being a dangerous aperture beneath it through which a person might easily fall.

Invitation to Danger.—Numerous instances may be given where a person, induced to do a dangerous act by the negligence of another, may recover damages

(*l*) *Crafter v. Metropolitan Railway Company*, L. R. I C. P. 300.

(*m*) 19 C. B. N. S. 183.

for injuries thereby sustained. A not unusual case of this kind is where a railway train overshoots the platform. The mere overshooting of a platform is not evidence of negligence, nor is the calling out of the name of the station before the train has come to a standstill (*n*). But when a train does overshoot a platform the railway company ought to take measures for the safety of the passengers in the carriages beyond the platform. This may be done by either backing the train, and in the meantime telling the passengers to keep their seats, or by assisting out of the train such as require assistance. And if they bring a train to a standstill at a place at which it is unsafe for a passenger to alight under circumstances which warrant the passenger in believing that it is intended that he shall get out, and that he may therefore do so with safety, and no warning of his danger be given, that is evidence of negligence for which, if injury ensues, an action may be brought (*o*). And even if the passenger sees the danger, but is satisfied that the train is about to move on without being in the first place backed, and that no one is coming to his assistance, he is not bound to wait till he reaches the next station, but may descend, using proper care, and, if he be injured whilst so doing, the company may be liable (*p*). To a like effect is the earlier case of *Clayards v. Dethick* (*q*), with which, however, should be read the judgment of Bramwell, B., in *Lax v. Corporation of Darlington* (*r*).

Again, railway companies are bound, under 8 & 9 Vict. c. 20, s. 47, where a railway crosses a public

(*n*) *Lewis v. London, Chatham, and Dover Railway Company*, L. R. 9 Q. B. 66; *Weller v. London, Brighton, and South Coast Railway Company*, L. R. 9 C. P. 126. See also *Siner v. Great Western Railway Company*, L. R. 3 Ex. 150, 4 Ex. 117; *Bridges v. North London Railway Company*, L. R. 7 H. of L. 213. See also *ante*, p. 106.

(*o*) *Cockle v. London and South-Eastern Railway Company*, L. R. 7 C. P. 321.

(*p*) *Robson v. North-Eastern Railway Company*, 2 Q. B. D. 85; *Rose v. North Eastern Railway Company*, 2 Ex. D. 248.

(*q*) 12 Q. B. 439.

(*r*) 5 Ex. D. 28, *ante*, p. 106; see also *Thomas v. Quartermaine*, 17 Q. B. D. 417; 18 Q. B. D. 685; and *post*, chap. x.

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highway, to make and maintain proper gates across the highway on each side of the railway, and to employ persons to open and shut them. Such gates are to be kept shut except when horses, cattle, carts, or carriages have to go across the railway. If such gates are left open, there is what is equivalent to a notice to the public that the line is safe for crossing; and where a person, after such notice, attempts to cross, and is knocked down by a passing train, he may hold the company answerable in damages, even if he might have seen the train coming, but, being in a position more or less embarrassing, did not use his faculties so clearly as he might have done under other circumstances (s).

But people must use every care in crossing a railway, and "if a railway train which ought to whistle when passing through a station were to pass through without whistling, and a man were, in broad daylight, and without anything, either in the structure of the line or otherwise, to obstruct his view, to cross in front of the advancing train and to be killed, I should think the judge ought to tell the jury that it was the folly and recklessness of the man, and not the carelessness of the company, which caused his death. This would be an example of what was spoken of in this House [the House of Lords], in the case of *Metropolitan Railway Company v. Jackson* (t), as an *incuria*, but not an *incuria dans locum injuriæ*. The jury could not be allowed to connect the carelessness in not whistling with the accident to the man who rushed, with his eyes open, on to his own destruction" (u).

(s) *North-Eastern Railway Company v. Wanless*, L. R. 7 H. of L. 12, where the plaintiff's attention was occupied with another train which had passed by.

(t) 3 App. Cas. 193.

(u) Per Lord Cairns, C., in *Dublin, Wicklow, and Wexford Railway Company v. Slattery*, 3 App. Cas. 1155; see *Darcy v. London and South-Western Railway Company*, 12 Q. B. D. 70.

CONTRIBUTORY NEGLIGENCE.

This brings us to the question of contributory negligence to which some reference has already been made (*x*). We have seen that the negligence for which a person may recover damages must be the *causa causans* of the injury sustained, and if his own negligence was the *causa causans*, or the direct cause of the injury, he cannot successfully claim damages from another who may have been negligent also, but whose negligence was not the direct cause of the injury (*y*). If a person sees a man furiously driving along a narrow road, and, making no effort to escape the approaching danger, allows himself to be run over, he may fail to obtain compensation; but, on the other hand, if a man is lying on a road drunk or asleep, this is no doubt negligence on his part, but he may nevertheless be entitled to compensation for injuries received if the driver of a carriage, seeing his condition, makes no effort to avoid him, but drives over him. A few cases may be given by way of illustration. In *Davies v. Mann* (*z*) the plaintiff, having fettered the forefeet of his donkey, turned it into a public highway, and, whilst the donkey was grazing on the side of the road, the defendant's waggon, drawn by three horses, coming down a slight descent at a smartish pace, knocked down the donkey, and, the wheels passing over it, it died soon afterwards. The jury were directed (and the direction was upheld by the Court) that, notwithstanding the conduct of the plaintiff in fettering the animal so as to prevent it from getting out of the way of carriages passing along the highway, they should find a verdict for the plaintiff, "if they thought that the accident might have been avoided by the exercise of ordinary care on the part of the

(*x*) See *ante*, p. 112.

(*y*) See the passage already quoted from the judgment of Lord Cairns, C., in *Dublin, &c., Railway Company v. Slattery*, 3 App. Cas. 1155, *ante*, p. 96.

(*z*) 10 M. & W. 546.

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defendant." *Tuff v. Warman* (a) is another well-known case. The action was brought against a Thames pilot for an injury to the plaintiff's barge in consequence of a collision with a vessel under the charge of the defendant. The defence was that the plaintiff, having been guilty of contributory negligence in not keeping a look-out, could not recover. The learned judge told the jury, in summing up, that if the parties on one vessel had a look-out, and still persisted in a course which would inflict an injury, then they were liable, though there was no look-out on the other vessel, for that would not be the direct cause of the injury. He further directed them that, if they thought the accident had been partly caused by the plaintiff's own negligence, they should find for the defendant; but that if they thought the barge was injured by the negligence of the defendant, and that the negligence of the plaintiff did not "directly" contribute thereto, the plaintiff was entitled to recover. This was upheld in the Common Pleas and Exchequer Chamber, Wightman, J., saying in the latter court: "It appears to us that the proper question for the jury in this case, and indeed in all others of the like kind, is, whether the damage was occasioned entirely by the negligence and improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary and common care and caution that, but for such negligence or want of ordinary and common care and caution on his part, the misfortune would not have happened. In the first case the plaintiff would be entitled to recover; in the latter, not, as, but for his own fault, the misfortune would not have happened. Mere negligence or want of ordinary care and caution would not, however, disentitle him to recover, unless it were such that, but for that negligence or want of ordinary care and caution the misfortune could not have happened, nor

(a) 2 C. B. N. S. 740, 5 C. B. N. S. 573.

if the defendant might, by the exercise of care on his part, have avoided the consequences of the neglect or carelessness of the plaintiff." See also *Radley v. London and North-Western Railway Company* (b), where the House of Lords very clearly laid down the law on the subject.

Identification.—It remains to add a few words on what is known as the "doctrine of identification." In *Thorogood v. Bryan* (c) the doctrine of contributory negligence was pushed so far that it was laid down that, in the case of a collision between two omnibuses, whereby a passenger in one omnibus is injured, the negligence of the driver of the omnibus in which he is riding may be set up by way of defence to an action by the passenger against the owner of the other omnibus; or, in other words, that, as regards contributory negligence, the passenger must be considered as "identified" with the driver of the omnibus in which he voluntarily became a passenger. The judgments in the case, as interpreted by Lord Esher, M.R., in *The Bernina* (d), "all amount to saying that, by what the plaintiff did, he made the driver his agent, so as to be liable for his acts, as if he, the plaintiff, had himself done those acts." In the later case of *Waite v. North-Eastern Railway Company* (e) it was held that

Thorogood v. Bryan and the doctrine of identification.

(b) 1 App. Cas. 754. See also *Coyle v. Great Northern Railway Company of Ireland*, 20 L. R. (Ir.), 409; and *Delaney v. Dublin United Tramways Company*, 30 L. R. (Ir.), 725, where the majority of the Court of Appeal reversing the Ex. Div., gave judgment for the defendants. There a drunken passenger attempted to force his way on to a tramcar, and had both feet on the step. Being gently pushed off by the conductor, whilst the car was in motion, he sustained injuries. The case cannot, it is submitted, be considered quite satisfactory. Ought not the conductor, as the man was on the car, to have stopped the car before removing him? Perhaps it may best be defended on the ground that by reason of the plaintiff's conduct he was put into such an embarrassing position that he could not at the moment use his faculties calmly and clearly, a contention which, conversely, a plaintiff may sometimes raise with reference to the defendant's conduct, when contributory negligence is set up against the plaintiff: See *North-Eastern Railway Company v. Wantless*, L. R. 7 H. of L. 12, ante, p. 122.

(c) 8 C. B. 115.

(d) 12 P. D. 58, at p. 68; affirmed in H. of L. *sub nom. Mills v. Armstrong*, 13 App. Cas. 1.

(e) E. B. & E. 719.

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a child of five years, with regard to contributory negligence, was identified with its grandmother who accompanied it, though it could not be said that there was any selection of its companion, or an act of volition on the part of the child. That case, however, was not decided on the doctrine of *Thorogood v. Bryan*, but rather on the ground that "when a child of such tender and imbecile age is brought to a railway station, or to any conveyance, for the purpose of being carried, and is wholly unable to take care of itself, the contract of conveyance is on the implied condition that the child is to be conveyed subject to due and proper care on the part of the person having it in charge." Lord Bramwell, however (*f*), held the decision in *Waite's* case to be wrong, and could not distinguish it from *Thorogood v. Bryan*. *Thorogood v. Bryan* was followed in *Armstrong v. Lancashire and Yorkshire Railway Company* (*g*), but it was at last overruled in the case of *The Bernina* (*h*), which decided that where A. is injured by the combined negligence of B. and C., he may sue both of them or one of them; and that if he sues one of them, the contributory negligence of the other will be no defence, unless A. stands in the relation of principal or master to that other. In that case a collision occurred between the steamers *Bernina* and *Bushire*, both vessels being in fault. An engineer and a passenger on board the *Bushire* were, owing to the collision, drowned. The engineer had nothing to do with the navigation of the vessel. The representatives of the drowned persons brought actions, under Lord Campbell's Act (9 & 10 Vict. c. 93), against the owners of the *Bernina*, and it was held by the Court of Appeal that the deceased persons were not to be deemed "identified" with those in charge of the *Bushire*, these latter being neither their servants nor agents, and that, consequently, the negligence of those

The Bernina
overruling
Thorogood v.
Bryan.

(*f*) 13 App. Cas. pp. 15, 16.

(*g*) L. R. 10 Ex. 47; see also *Child v. Hearn*, L. R. 9 Ex. 176.

(*h*) *Ubi supra*.

in charge of the *Bushire* was no defence to an action brought by the representatives of the deceased persons against the owners of the *Bernina* (i).

Summary of
the law.

The law, therefore, stands in this way :—(1) A., without fault of his own, is injured by the negligence of B. —then B. is liable to A. (2) A., by his own fault, is injured by B., without fault on his part—then B. is not liable to A. (3) A. is injured by B., by the fault more or less of both combined—then the following further distinctions have to be made : (a) if, notwithstanding B.'s negligence, A., with reasonable care, could have avoided the injury, he cannot sue B. ; (b) if, notwithstanding A.'s negligence, B., with reasonable care, could have avoided injuring A., A. can sue B. ; (c) if there has been as much want of reasonable care on A.'s part as on B.'s, or, in other words, if the proximate cause of the injury is the want of reasonable care on both sides, A. cannot sue B., for here the injury has been caused by A.'s own carelessness and B.'s negligence, and the two combined give no cause of action. Now, substitute in the foregoing cases B. and C. for B., and, unless C. is A.'s agent or servant, there will be no difference in the result, except that A. will have two persons, instead of one, liable to him. See the judgment of Lindley, L.J., in *The Bernina* (k).

Liability of Bodies created by Statute. (l)—“ It is now thoroughly well established that no action will lie for doing that which the Legislature has authorised, if it be done without negligence, although it does occasion damage to anyone ; but an action does lie for doing that which the Legislature has authorised, if it be done negligently ” (m). In other words, a distinction must be drawn “ between damage from works authorised by

(i) It was also held that actions under Lord Campbell's Act are not Admiralty actions, and are not affected by the Judicature Act, 1873, s. 25, and therefore that the Admiralty rule as to half damages does not apply to them.

(k) *Ubi supra*.

(l) See *Nuisances in the exercise of Statutory Powers*, ante, p. 87.

(m) *Geddis v. Proprietors of Bann Reservoir*, 3 App. Cas. 430, 455.

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statutes, where the party generally is to have compensation (*i.e.*, such as may be allowed by the statutes), and the authority is a bar to an action, and damage by reason of the works being negligently done, as to which the owner's remedy by way of action remains" (*n*). "In every case the liability of a body created by statute must be determined upon a true interpretation of the statutes under which it is created. The proper rule of construction of such statutes is, that, in the absence of something to shew a contrary intention, the Legislature intended that the body, the creature of the statute, shall have the same duties, and that its funds shall be rendered subject to the same liabilities as the general law would impose on a private person doing the same things" (*o*). Commissioners and other public trustees, though they have no pecuniary interest in the trust which they administer, cannot therefore escape liability when they are negligent in the active execution of their powers. But in the case of mere non-feasance no claim for reparation will lie, except at the instance of a person who can shew that the statute or ordinance under which they act imposed upon them a duty towards himself which they negligently failed to perform (*p*), or that they are under contract with him for remuneration(*q*).

(*n*) *Brine v. Great Western Railway Company*, 2 B. & S. 402.

(*o*) *Mercsey Docks Trustees v. Gibbs*, L. R. 1 H. of L. 93, at pp. 104, 109.

(*p*) *Sanitary Commissioners of Gibraltar v. Orfila*, 15 App. Cas. 400, 411.

(*q*) *Brabant v. King* (1895), App. Cas. 632.

CHAPTER VII.

FRAUD AND DECEIT.

Fraud and Deceit.—Fraud, accompanied by CHAP. VII.
 damage, may be the ground of an action. “Fraud without damage, or damage without fraud, gives no cause of action; but where these two occur, an action lies” (a). Much confusion has been caused in connection with this subject by reason of the use of the words “legal fraud” and “moral fraud.” However, it may now be said that no distinction can be drawn between legal and moral fraud; or, in other words, that, where actionable fraud is alleged against a person, there must, to enable a person to succeed in an action against him, be actual fraud (b). Possibly the judges who first spoke of fraud in law, or legal fraud, did not mean to exclude the existence of fraud in fact, but only of an intention to defraud or injure, which intention, as we shall see, is not necessary for an action of fraud or deceit (c). But in more modern times such actions have been held maintainable, erroneously as *Derry v. Peck* explains, although the statements complained of were not shewn to be made fraudulently otherwise than by shewing that they were made “without any reasonable ground for believing” them (d). The foundation of this erroneous view seems to have been a passage in the judgment of Lord Chelmsford in *Western Bank*

(a) Per Croke, J., 3 Buls. 95; *Smith v. Chadwick*, 9 App. Cas. 187, at p. 197.

(b) See *Weir v. Bell*, 3 Ex. D. 238; *Derry v. Peck*, 14 App. Cas. 337, at p. 372.

(c) See *Derry v. Peck*, *supra*, pp. 372, 374.

(d) See e.g., *Edgington v. Fitzmaurice*, 29 Ch. D. 459, 481 (1885), and *Peck v. Derry*, in Court of Appeal, 37 Ch. D. 541, pp. 568, 582 (1887).

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Rescission of Contract.—Before dealing further with the action of deceit or fraud, there are two classes of actions which may be mentioned for the purpose of excluding them from consideration for the present. The first of these are actions where rescission of a contract is claimed. In such an action it is not necessary to prove fraud. Misrepresentation will be sufficient; and if the plaintiff can prove misrepresentation

(e) L. R. 1 H. of L. Sc. 145, 162.

(f) *Supra*; see pp. 368, 369, 374.

inducing the contract, he will be entitled to a rescission, provided *restitutio in integrum* on his part has not become impossible (*g*). It is beyond the scope of this treatise to deal further with this class of actions.

Actions for Statements made by Persons best qualified to give Information.—The second class of actions which may be mentioned for the purpose of being put aside for the moment are actions brought against persons within whose special province it lies to know a particular fact, and who have given an erroneous answer to an enquiry made with regard to it by a person desirous of ascertaining the fact for the purpose of determining his course accordingly (*h*). Whether, since the decision of the House of Lords in *Derry v. Peek*, such actions are now maintainable without actual fraud, and, if so, upon what grounds, will be a matter for consideration at a subsequent page (*i*).

Fraud and Deceit continued.—It is hardly necessary to say that an action of fraud or deceit is a common law action, and must be decided on the same principles, whether it be brought in the Chancery Division or in the Queen's Bench Division, there being no such thing as an equitable action of fraud or deceit (*k*). For the better understanding of the action, a few of the early authorities may be usefully referred to.

In *Foster v. Charles* (*l*) it was contended that the defendant was not liable, even though the representation he made was false to his knowledge, because he had no intention of defrauding or injuring the plaintiff. But the Court held otherwise, Tindal, C.J., saying: "It is fraud in law if a party makes

(*g*) See *Adam v. Newbigging*, 13 App. Cas. 303; *Derry v. Peek*, 14 App. Cas. 337, 359. See also *Lynde v. Anglo-Italian Hemp-Spinning Company* (1896), 1 Ch. 178.

(*h*) See *e.g.*, *Burrowes v. Lock*, 10 Ves. 470; *Slim v. Croucher*, 1 De G. F. & J. 518.

(*i*) See *post*, p. 146.

(*k*) *Derry v. Peek*, *ubi supra*, at p. 360.

(*l*) 7 Bing. 105.

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Of the doctrine laid down in *Foster v. Charles* (*o*), a well-known illustration may be given. A bill of exchange, drawn upon A. B., is presented for acceptance at the office of the drawee in his absence. C. D., who occupies the same office as the drawee, being told by the payee that the bill is all right, and that it will be protested if not accepted, and that thereby expense will be caused, and believing that the acceptance will be sanctioned by the drawee, accepts the bill *per procuracion* of the drawee. The payee then indorses the bill away. The drawee will not be liable upon it, for he never authorised the acceptance, but C. D. will be liable to the indorsees, having, by the unauthorised acceptance of the bill *per procuracion* of the drawee, made a representation which he knew to be untrue, and which was intended by him, or was calculated, to induce another to act on the faith of it in such a way that he might incur damage, and that damage has been incurred (*p*). In that case, according to the finding of the jury, there was no fraud in the sense of a corrupt or improper motive on the part of the defendant who had accepted the bill; but the Court agreed with the contention raised on behalf of the plaintiff that in order to maintain this species of

(*m*) See *Derry v. Peck*, *ubi supra*, at p. 365.

(*n*) *Crawshaw v. Thompson*, 4 M. & G. 357.

(*o*) *Supra*.

(*p*) *Polhill v. Walter*, 3 B. & Ad. 114.

action it is not necessary to prove that the false representation was made from a corrupt motive of gain to the defendant or a wicked motive of injury to the plaintiff; and that it is enough if a representation is made which the party making it knows to be untrue, and which is intended by him, or which from the mode in which it is made is calculated, to induce another to act on the faith of it in such a way that he may incur damage, and that damage is actually incurred (*q*). In a subsequent case *Maule, J.*, puts the point pithily: "If a wrong be done by a false representation of a party who knows such representation to be false, the law will infer an intention to injure. That is the effect of *Polhill v. Walter*" (*r*).

Denton v. Great Northern Railway Company (*s*) is another useful case. There the defendants advertised in a monthly time-table that a train would leave Peterborough at 7 P.M. for the conveyance of passengers to Hull. The latter part of the journey would have to be accomplished over the line of the North-Eastern Railway Company. That company had, however, ceased to run the train to Hull which would convey thither passengers leaving Peterborough at 7 P.M., and had given notice thereof to the defendants, who, nevertheless, made no alteration in their time-table. The plaintiff, relying on the time-table, proceeded to Peterborough in order to take a ticket at 7 P.M., but found that there was no train to convey him to Hull. He incurred expense, and the defendants were held liable, as they had knowingly made an untrue statement upon which the plaintiff was induced to act.

But a person may be liable to an action for deceit though he did not know the facts stated by him to be untrue. It will be sufficient if he has stated facts

Untrue statements, not believed to be true, made for a fraudulent purpose.

(*q*) See also *Derry v. Peck*, *ubi supra*, at p. 366.

(*r*) *Crawshaw v. Thompson*, 4 M. & G. 357; see also *Peck v. Gurney*, L. R. 6 H. of L. 377, especially the dictum of Lord Cairns at p. 409, explained in *Derry v. Peck*, 14 App. Cas. at p. 371.

(*s*) 5 E. & B. 860.

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Dicta of Lord
Cairns.

which were untrue for a fraudulent purpose, he at the same time *not believing* those facts to be true (*t*). “If a man, having no knowledge whatever on the subject, takes upon himself to represent a certain state of facts to exist, he does so at his peril; and if it be done either with a view to secure some benefit to himself or to deceive a third person, he is in law guilty of a fraud, for he takes upon himself to warrant his own belief of the truth of that which he so asserts” (*u*). The foundation of the above proposition is that a person who makes a statement which he intends another to act on must be taken to warrant his belief in its truth. He knows that the person to whom the statement is made will understand, if not that he who makes it *knows*, yet at least that he *believes*, it to be true. And if he has no such belief he is as much guilty of fraud as if he made any other representation which he knew to be false, or did not believe to be true (*x*). Much to the same effect is the well-known dictum of Lord Cairns (*y*): “If persons take upon themselves to make assertions as to which they are ignorant whether they are true or untrue, they must, in a civil point of view, be held as responsible as if they had asserted that which they knew to be untrue.” The case in which this dictum is to be found is one dealing with the rescission of a contract; but the dictum is equally applicable to an action of deceit if it be interpreted to mean, as it must mean, that the persons referred to were conscious when making the assertions that they were ignorant whether they were true or untrue (*z*).

Peck v. Gurney (*a*) contains some other observations of the same learned lord on this subject which require a word of explanation. That was an action against directors of a company by a person who alleged that he had

(*t*) *Taylor v. Ashton*, 11 M. & W. 401.

(*u*) *Evans v. Edmunds*, 13 C. B. 777, per Maule, J.

(*x*) See *Derry v. Peck*, 14 App. Cas. at p. 368.

(*y*) *Reese River Silver Mining Company v. Smith*, L. R. 4 H. of L. 64, at p. 79.

(*z*) See *Derry v. Peck*, 14 App. Cas. at p. 371.

(*a*) L. R. 6 H. of L. 377, at p. 409.

been deceived and misled by untrue representations contained in the prospectus of the company. His lordship, after alluding to the fact that the defendants had been acquitted of fraud on a criminal charge, said: "But in a civil proceeding of this kind all that your lordships have to examine is the question, was there, or was there not, misrepresentation in point of fact? If there was, however innocent the motives may have been, your lordships will be obliged to arrive at the consequences which properly would result from what was done." In this case it was clear that if there had been a false statement of fact it had been knowingly made. Lord Cairns did not mean that in an action of deceit the only question to be considered was whether or not there was misrepresentation in point of fact. What he meant was, that in such a case *motive* was immaterial: that it mattered not that there was no design to mislead or defraud the public if a false representation were knowingly made, and this was simply affirming the law laid down in *Foster v. Charles* (b), and *Polhill v. Walter* (c), and other cases (d).

Plaintiff must shew that he acted on the false representation and was thereby damaged.—The plaintiff in an action of deceit must not only shew that the defendant made an untrue statement or representation knowingly, or not believing in its truth, but also that the statement or representation was acted on by the plaintiff and caused damage: for, as has been shewn, fraud without damage gives no cause of action. If a person has not acted upon the representations made to him, he has not sustained damage by reason of them. That he has sustained damage by so acting is a fact which must be proved by the plaintiff. It is not an inference of law in any case that a person has acted upon a representation made to him, though there may be cases in which it would be a fair inference of

Representation must be untrue in fact, and must be acted on by the plaintiff to his damage.

(b) 7 Bing. 105; *ante*, p. 131.

(c) 3 B & Ad. 114; *ante*, p. 132.

(d) Per Lord Herschell, in *Derry v. Peck*, 14 App. Cas. at p. 371.

CHAP. VII. *fact that he has done so—if, for example, it is proved that a representation has been made to him with a view to induce him to enter into a contract, and the representation is of such a nature as to induce a person to enter into such a contract, and he has entered into it (e).*

Misrepresentation must be material.

If a representation has been made of so unimportant a character that it cannot have produced any effect, an action for deceit will not lie; the representation must be an inducing cause to a plaintiff's conduct, and for that purpose it must be material, and have produced an effect on his mind. If the representation be equally capable of two meanings, it will be incumbent on a plaintiff to shew that he interpreted it in the sense which was false, and that he was thereby misled (*f*).

Where representation ambiguous.

Opportunity of investigation by person to whom representation made.

It has been held that the mere fact that a party has the opportunity of investigating and ascertaining whether a representation is true or false is not sufficient to deprive him of his right to rely on a false representation as a defence to an action for specific performance, and that to take away his title to be relieved from a contract on the ground that the representation was untrue, it must be shewn either that he had knowledge of facts contrary to the representation, or that he stated in terms, or shewed clearly by his conduct, that he did not rely upon the representation (*g*). So, too, in *Central Railway Company of Venezuela v. Kisch* (*h*) it was laid down that, where there has been any fraudulent misrepresentation or wilful concealment by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it to tell him that he might have known the truth by proper inquiry. These are decisions in equity, but the same doctrine would apply where a common law action of deceit is brought (*i*).

(e) See *Smith v. Chadwick*, 20 Ch. D. 27; 9 App. Cas. 187; *Arnison v. Smith*, 41 Ch. D. 348, 369.

(f) *Smith v. Chadwick*, *ubi supra*.

(g) *Redgrave v. Hurd*, 20 Ch. D. 1.

(h) L. R. 2. H. of L. 99.

(i) *Dobell v. Stevens*, 3 B. & C. 623.

“ Although means of knowledge are, as was pointed out by Lord Blackburn in *Brownlie v. Campbell* (k) a very different thing from knowledge, yet (says Lord Herschell), if I thought that a person making a false statement had shut his eyes to the facts, or purposely abstained from enquiring into them, I should hold that honest belief was absent, and that he was just as fraudulent as if he had knowingly stated that which was false ” (l).

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Opportunity of investigation by person making representation.

Where a Person discovers his Representation to be Untrue.—If a statement or representation has been made in the *bonà-fide* belief that it is true, and the party who has made it afterwards comes to find out that it is untrue, and discovers what he should have said, he ought, as a matter of honesty, to disclose his fresh information to a person to whom he has made, and who is acting upon, his statement or representation. His failure to do so would, at least in the case where another is, on the faith of the statement or representation, about to enter into a contract with him, amount to a fraud (m). There was no doubt that this was a well-established rule in equity, and, if it was not so at common law, yet, as s. 25 (11) of the Judicature Act, 1873, makes the rules of equity prevail where there is any variance between them and the rules of common law with reference to the same matter, it would seem that the rule in equity would apply to the common law action of deceit (n).

Where person making the representation discovers that it is not true.

Correction of Misrepresentation by a Subsequent Statement.—If A. knowingly makes an untrue statement, and B. acts on it, then if A. wishes to correct it, he should inform B. in clear terms that there was a misrepresentation, and offer to refund any money which B. paid in reliance on it. This, possibly, may

(k) 5 App. Cas. at p. 652.

(l) See *Derry v. Peck*, 14 App. Cas. at p. 376.

(m) See *Reynell v. Sprye*, 1 D. M. & G. 656, 703; *Brownlie v. Campbell*, 5 App. Cas. 925, 950.

(n) See *Redgrave v. Hurd*, 20 Ch. D. 1; but cf. *Arkwright v. Newbold*, 17 Ch. D. 301, and *Jolliffe v. Baker*, 11 Q. B. D. 255.

CHAP. VII. do away with the effect of the misrepresentation. But the correction must be explicit (*o*). Thus, directors of a company falsely stated in the prospectus inviting applications for debenture stock that £200,000 share capital had been "subscribed," whereas, in fact, it had only been allotted in fully paid up shares to the contractors. After the allotment of the debenture stock the directors sent to the allottees a circular stating, among other matters, the real facts about the share capital, but not stating that there had been a misrepresentation, or informing the allottees that they could get back their money. The company proved a complete failure, and allottees, who had applied for the debenture stock relying on the prospectus (including those who paid instalments falling due after the issue of the circular), were held to have a good cause of action against the directors (*o*).

Concealment
of material
facts.

Concealment of Material Facts.—The mere non-disclosure of material facts may be a good ground for setting aside a contract. But that was not sufficient for the common law action of deceit. For an action in the nature of an action for misrepresentation, says Lord Cairns, "there must, in my opinion, be some active misstatement of fact, or, at all events, such a partial and fragmentary statement of fact as that the withholding of that which is not stated makes that which is stated absolutely false" (*p*). And, notwithstanding s. 25, sub-s. 11, of the Judicature Act, 1873, this has been held to be still the law (*q*).

Representa-
tion need not
be made to the
plaintiff him-
self.

To whom Representation made.—To enable a plaintiff to succeed in an action of deceit it is not necessary that the representation complained of, and on which he has acted to his damage, should have been made expressly to himself. It will be sufficient

(*o*) *Arnison v. Smith*, 41 Ch. D. 348.

(*p*) *Peck v. Gurney*, L. R. 6 H. of L. 377, at p. 403.

(*q*) *Arkwright v. Newbold*, 17 Ch. D. 301, 313, 320; *cf.*, however, *Brownlie v. Campbell*, 5 App. Cas. at p. 950.

if he is *one of a class* who are intended to act on it, CHAP. VII.
 or if it is intended that any one to whom it comes
 should act on it. *Denton v. Great Northern Railway
 Company* (r), already referred to, is an authority
 for this.

So, too, is *Scott v. Dixon* (s), referred to with
 approval in *Peck v. Gurney* (t). There an action was
 brought against a director of a banking company for
 falsely, fraudulently, and deceitfully publishing and
 representing to the plaintiffs that a dividend was
 about to be paid out of the profits which were
 sufficient for payment of the dividend, and that the
 shares were a safe investment for money. The plain-
 tiffs bought their shares upon the faith of a report
 made by the directors to the shareholders, which
 contained the false representations. Copies of this
 report were left at the bank, and were to be had
 by sharebrokers or any persons applying for them
 who were desirous of information with regard to the
 affairs of the bank with a view to the purchase of
 shares. The plaintiffs purchased at the bank, through
 their broker, a copy of the report. The Court of
 Queen's Bench held that, there being positive evidence
 that the report was to be bought by any person who
 thought of becoming a purchaser of shares, and that it
 came into the hands of the plaintiffs in this manner,
 and that by the perusal of it they were induced to buy
 shares in the bank, there was a publication to the
 plaintiffs in the sense of the declaration. "I do not
 doubt," says Lord Chelmsford, "the propriety of this
 decision. The report, though originally made to the
 shareholders, was intended for the information of all
 persons who were disposed to deal in shares; and the
 representation must be regarded as having been
 made, not indirectly, but directly to each person who

(r) 5 E. & B. 860, *ante*, p. 133. See also *Langridge v. Levy*,
 2 M. & W. 419; 4 M. & W. 337, *ante*, p. 108.

(s) 29 L. J. Ex. at p. 62, n.

(t) L. R. 6 H. of L. 377, *ante*, p. 134.

CHAP. VII. obtained the report from the bank, where it was publicly announced it was to be bought, in the same manner as if it had been personally delivered to him by the director."

Again, in *Polhill v. Walter* (u) it was held that the defendant, by his unauthorised acceptance of the bill of exchange on behalf of the drawee, must be taken to have intended that all persons should give credit to the acceptance, and thereby act upon the faith of his representation, because that, in the ordinary course of business, was its natural and necessary result.

How far liability for a fraudulent prospectus extends.

If the promoters of a company issue a prospectus containing misrepresentations of material facts, persons who are induced to become allottees of the shares of the company upon the faith of such misrepresentations may hold the promoters liable for the damages which they have sustained by taking the shares. But, as a rule, liability for misrepresentations in the prospectus would exist only towards the original allottees of the shares who have relied on it, and subsequent purchasers of shares in the market cannot fasten upon the promoters responsibility for such misrepresentations (x). Lord Cairns, in the course of his judgment in this case, refers with approval to *Barry v. Croskey* (y), where the following concise statement occurs: First, "Every man must be held responsible for the consequences of a false representation made by him to another, upon which that other acts, and, so acting, is injured or damnified; secondly, every man must be held responsible for the consequences of a false representation made by him to another, upon which a third person acts, and, so acting, is injured or damnified, provided it appear that such false representation was made with the intent that it should be acted on by such third person

(u) 3 B. & Ad. 114; *ante*, p. 132.

(x) *Peck v. Gurney*, L. R. 6 H. of L. 377.

(y) 2 J. & H. 1, at p. 22.

in the manner that occasions the injury or loss.” **CHAP. VII.** And, thirdly, he continues: “But, to bring it within the principle, the injury, I apprehend, must be the immediate and not the remote consequence of the representation thus made. To render a man responsible for the consequences of a false representation made by him to another, upon which a third person acts, and, so acting, is injured or damnified, it must appear that such false representation was made with the direct intent that it should be acted upon by such third person in the manner that occasions the injury or loss.” Generally, therefore, a purchaser of shares in the market, having nothing to connect him with the misrepresentations made in a prospectus which is issued for the purpose of inviting persons to become allottees of shares, cannot recover damages against those who have issued the prospectus. He may, indeed, in one case succeed, and that is where he can shew some direct connection between himself and those who have issued the prospectus (z), or if they have done something to induce him to believe the fraudulent misrepresentations in the prospectus, and thereupon purchase shares in the market. Thus, A. and B. issued a prospectus of a company containing fraudulent misrepresentations, and subsequently, after the allotment (which was not successful), caused to be published a statement which they knew to be false, with a view to induce those who had seen the prospectus to buy shares in the market; C. having read the published statement, and believing that it confirmed what was stated in the prospectus (which he had received), purchased some of the shares, which were worthless; held, that he had a good cause of action against A. and B. (a).

Summary.—What is requisite for an action of deceit having been set forth in the preceding pages, it may

(z) See *Barry v. Croskey*, 2 J. & H. 1.

(a) *Andrews v. Mockford* (1896), 1 Q. B. 372.

CHAP. VII.

Statement by
Bowen, L.J.

be useful, at this stage, to give the late Lord Justice Bowen's brief summary of the law on the subject (*b*) :—

“ This is an action for deceit, in which the plaintiff complains that he was induced to take certain debentures by the misrepresentations of the defendants, and that he sustained damage thereby. The loss which the plaintiff sustained is not disputed. In order to sustain his action, he must first prove that there was a statement as to facts which was false, and, secondly, that it was false to the knowledge of the defendants, or that they made it not caring whether it was true or false. For it is immaterial whether they made the statement knowing it to be untrue, or recklessly without caring whether it was true or not, because to make a statement recklessly for the purpose of influencing another person is dishonest. It is also clear that it is wholly immaterial with what object the lie is told. That is laid down in Lord Blackburn's judgment in *Smith v. Chadwick* (*c*), but it is material that the defendant should intend that it should be relied on by the person to whom he makes it (*d*). But, lastly, when you have proved that the statement was false, you must further shew that the plaintiff has acted upon it, and has sustained damage by so doing. You must shew that the statement was either the sole cause of the plaintiff's act, or materially contributed to his so acting. So the law is laid down in *Clarke v. Dickson* (*e*), and that is the law which we have now to apply.”

The dictum of Lord Chelmsford to which reference has already been made (*f*) seems to have induced certain judges to hold, before the judgment of the

(*b*) See *Edgington v. Fitzmaurice*, 29 Ch. D. 459, 481; see also *Arnison v. Smith*, 41 Ch. D. 348.

(*c*) 9 App. Cas. 201.

(*d*) See as to this, *Polhill v. Walter*, 3 B. & Ad. 114; *Derry v. Peck*, 14 App. Cas. at p. 366; *ante*, p. 132.

(*e*) 6 C. B. N. S. 453.

(*f*) See *Western Bank of Scotland v. Addie*, L. R. 1 H. of L. Sc. 45, 162; *ante*, p. 130.

House of Lords in *Derry v. Peck* (g), that in an action of deceit it was unnecessary for the plaintiff to prove actual fraud, if he shewed that the defendant had "no reasonable grounds for believing" to be true the statement made by him and acted on by the plaintiff to his damage (h). Cotton, L.J., in *Peck v. Derry* (i) laid down that there is a duty cast on directors of companies and other persons who make statements to be acted on by third persons to take care that the statements are not false, and that they have "reasonable grounds" for believing those statements to be true, and that if a man makes a false statement to induce others to act on it, without reasonable grounds to suppose it to be true, and without taking care to ascertain whether it is true, he is liable civilly as much as a person who commits what is usually called fraud, and tells an untruth knowing it to be an untruth. This view was, as has been shewn, held to be wrong by the House of Lords in *Derry v. Peck*. In the course of a long speech Lord Herschell summarises the law as follows: "First, in order to sustain an action of deceit there must be fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second: for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false has obviously no such

Lord Herschell's summary of an action of deceit.

(g) 14 App. Cas. 337.

(h) See *Weir v. Bell*, 3 Ex. D. 238, per Cotton, L.J.; *Smith v. Chudwick*, 20 Ch. D. 27, 44; *Peck v. Derry* (in C. of App.), 37 Ch. D. 541.

(i) *Ubi supra*.

CHAP. VII. honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made" (*k*).

Cases subsequent to *Derry v. Peck*.

The case of *Derry v. Peck* in the House of Lords has been found to be one of great importance. Besides shewing that for an action of deceit there must be fraud, that is, a wilful lie, or "wicked indifference," it also shews that (in the absence of contract) an action will not lie for mere negligent misrepresentation (*l*). The decision may be traced in many recent cases. For example: Mortgagees of a builder's interest in a building agreement made advances to him on the faith of certificates of a surveyor that certain specified stages in the progress of the buildings had been reached. The surveyor was not appointed by the mortgagees, nor was there any contractual relation between him and them. Owing to the surveyor's negligence the certificates contained untrue statements as to the progress of the buildings, but there was no fraud on his part. The mortgagees, who had made advances beyond the value of the work done, sought to make the surveyor liable for their loss, on the ground that he knew, or ought to have known, that the certificates might be used for the purpose of obtaining advances, and that on the principles laid down in *Heaven v. Pender* (*m*) the surveyor owed a duty to those into whose hands the certificates might come. It was held that in the absence of contract there was no such duty; that though, according to *Heaven v. Pender*, and cases of that class, the owner of dangerous chattels, or the owner of premises in a dangerous condition, may owe a duty to those who come into proximity to them, yet what a man writes on paper is not like a dangerous instrument, and in

(*k*) See 14 App. Cas. at p. 374.

(*l*) See *Le Lievre v. Gould* (1893), 1 Q. B. 491, at pp. 498, 500-1; *Low v. Bouccrie* (1891), 3 Ch. 82, at p. 105.

(*m*) 11 Q. B. D. 503; *ante*, p. 101; *Cann v. Willson*, 39 Ch. D. 39 (now overruled by the case under discussion), was also relied on.

the absence of fraud or contract he is not liable for negligence in so writing (n). CHAP. VII.

It is important to notice that the decision of the House of Lords in *Derry v. Peek* (o) has, by the Directors Liability Act, 1890 (p) been modified, so far as regards directors and promoters of companies and other persons who authorise the issue of prospectuses asking for subscriptions to the companies. Where after the passing of that Act (which was on the 18th of August, 1890), a prospectus is issued inviting persons to subscribe for shares, debentures or stock in a company, the directors and promoters of the company and others who have authorised the issue of the prospectus, are liable to compensate subscribers who have sustained loss by reason of untrue statements in, or referred to in, the prospectus, *unless it is proved* (a) with respect to untrue statements which do not purport to be made on the authority of an expert or public official document, that they believed and had "reasonable ground to believe" them to be true; and (b) with respect to untrue statements purporting to be statements by or contained in a report or valuation of an expert, that they fairly represent such statements or were fairly copied from such report and valuation: but this will not avail those who authorise the issue of the prospectus if it be proved that they had no "reasonable ground to believe" that the expert was competent to make the statements, report, or valuation; and (c) with respect to untrue statements that purport to be statements of a public official or contained in a public official document, that they fairly represent what was so stated, or what appears in such document: Or, secondly, *unless it is proved* that any such director withdrew his consent, before the issue of the prospectus, to be a director, and that

Change in the law since *Derry v. Peek*.

Directors Liability Act, 1890.

(n) *Le Lievre v. Gould*, *supra*. For other cases following *Derry v. Peek*, *supra*; see *Glasier v. Rolls*, 42 Ch. D. 436 (1889); *Angus v. Clifford* (1891), 2 Ch. 449; *Low v. Bouccarie* (1891), 3 Ch. 82.

(o) 14 App. Cas. 337.

(p) 53 & 54 Vict. c. 64.

CHAP. VII. the prospectus was issued without his consent, or that it was issued without his knowledge or consent, and that he forthwith gave public notice of that fact on becoming aware of its issue, or that after its issue and before allotment he, on becoming aware of untrue statements in it, gave public notice of the withdrawal of his consent thereto, and of the reason for such withdrawal.

Statements made by persons with special opportunities of knowledge.

It should be mentioned that the House of Lords in *Derry v. Peek* (q) did not profess to overrule cases like *Burrows v. Lock* (r), and *Slim v. Croucher* (s), and Lord Selborne, in 1880, appeared to consider these two cases good law (t). But it has now been held by the Court of Appeal (u) that *Slim v. Croucher* must be considered overruled, and that the decision in *Burrows v. Lock* can only be upheld on the ground of estoppel or possibly of fraud. In this last-mentioned case the plaintiff was the assignee of one of several residuary legatees for his share of the residue of a testator's estate, whilst the defendants were the plaintiff's assignor and the trustee of his share of the residue. The trustee had informed the plaintiff that this share was unincumbered, whereas, in fact, it was not, and by the decree he was ordered to pay to the plaintiff the full amount of the share, without deducting the incumbrance. Though estoppel is not a cause of action it is a rule of evidence which precludes a person from denying the truth of a statement previously made by him, and the trustee in this case, even if he had acted honestly, which seemed doubtful, was estopped from denying that the share was unincumbered (r). In *Slim v. Croucher* a person who was

(q) 14 App. Cas. 337 ; see *ante*, p. 131.

(r) 10 Ves. 470.

(s) 1 De G. F. & J. 518.

(t) See *Brownlie v. Campbell*, 5 App. Cas. 925, at p. 935.

(u) (1891) 3 Ch. 82.

(x) Cf. with the judgments in *Low v. Bouverie*, *ubi supra*, the speeches of the Lords in *Brownlie v. Campbell*, *ubi supra*. As to *Estoppel* see *Pickard v. Sears*, 6 A. & E. 469 ; *Freeman v. Cooke*, 2 Ex. 654 ; *In re Bahia and San Francisco Railway Company*, L. R.

asked to lend money on the security of a lease, which the borrower said he was entitled to have granted to him, made enquiries of the lessor, and received from him an assurance that he was agreeable to grant to the borrower a peppercorn lease of the property in question. In fact, he had already granted the lease, and the borrower had mortgaged it; but the lessor had forgotten the previous grant. The money having been lent on the faith of this statement the lessor was directed to repay it with interest and costs. It has now been held that in this case, there being no fraud, and the doctrine of estoppel not being applicable, as an action for specific performance could not be maintained by the lender against the lessor, the decision cannot be upheld, except possibly on the ground of warranty (y).

In *Low v. Bouverie* (y) B., who was entitled under a settlement to a life-interest in a trust-fund, applied to the plaintiff for a loan on the security of such interest, and referred him to the defendant, one of the trustees of the settlement, for information as to his position. The plaintiff wrote to the defendant asking if B.'s life-interest was subject to any incumbrances, but not stating that B. had applied for an advance. The defendant replied that the life-interest was subject to certain incumbrances which he mentioned, but he did not say that there were no others. The plaintiff then made an advance to B. on the security of the life-interest. He afterwards found that there were other incumbrances prior to his own on the life-interest, besides those which the defendant had mentioned, and his security thus became worthless. It was admitted by the plaintiff that the defendant had forgotten these

3 Q. B. 584. A company is not estopped by a "certification" stating that a share certificate has been lodged; *Bishop v. Balkis Consolidated Company*, 25 Q. B. D. 77, 512; but it is by a "share certificate"; *Tomkinson v. Balkis Consolidated Company* (1891), 2 Q. B. 614; *In H. of L.* (1893), App. Cas. 396; *In re Ottos Kopje Diamond Mines* (1893), 1 Ch. 618.

(y) See *Low v. Bouverie* (1891), 3 Ch. 82.

CHAP. VII. when replying to his enquiry. The plaintiff sought to make the defendant liable for the amount due on the security, alleging that the advance was made on the faith of his representations. The action failed: of fraud it was admitted there was none: as to breach of duty, it was held to be no part of a trustee's duty to give such information to a *cestui que trust* as will enable him to squander or anticipate his fortune, and a purchaser of his interest cannot be in a better position: again, the facts did not amount to a contract of warranty: lastly, there was no estoppel, for the defendant's statement was consistent with the view that the incumbrances mentioned by him were all that he remembered. If he had given a positive assurance that there were no others, and the plaintiff, relying on that, had lent his money, he could not, upon the plaintiff afterwards taking proceedings against him to realise his security, be heard to say that there were other incumbrances which he had forgotten.

Agent contracting without authority.

Agent Contracting without Authority.—There is a well-known class of cases in which persons professing to act as agents have been held liable to make good their representations, or, rather, to pay the damages caused by them, not on the ground that those representations were fraudulent or even reckless, but rather on the ground that the persons have entered into an implied warranty that they had authority to make them. In other words, though, as a general rule, an action for damages will not lie against a person who honestly makes a representation which misleads another, yet it is well established that where an agent assumes an authority which he does not possess, and induces another to deal with him upon the faith that he has the authority which he assumes, he must pay for the damage which he thereby causes (z). Thus in *Collen v. Wright* (z), the

(z) See *Firbank v. Humphries*, 18 Q. B. D. 54, following *Collen v. Wright*, 7 E. & B. 301, 8 E. & B. 647. Cf. *Elkington & Company v. Hürter* (1892), 2 Ch. 452.

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defendant, who was agent of Gardner, entered into an agreement, as such agent, with the plaintiff for the lease to him, for a certain number of years, of land belonging to Gardner. Both the plaintiff and Wright believed that the latter had authority from Gardner to enter into such agreement on his behalf, but there was no such authority, and Gardner repudiated the agreement. Wright's executors were held liable for the damages caused by their testator's assumption of authority to act as agent, on the ground that "a person who induces another to contract with him as the agent of a third party, by an unqualified assertion of his being authorised to act as such agent, is answerable, to the person who so contracts, for any damages which he may sustain by reason of the assertion of authority being untrue. . . . The fact that the professed agent honestly thinks that he has authority affects the moral character of his act; but his moral innocence, so far as the person whom he has induced to contract is concerned, in no way aids such person or alleviates the inconvenience and damage which he sustains. The obligation arising in such a case is well expressed by saying that a person, professing to contract as agent for another, impliedly, if not expressly, undertakes to or promises the person who enters into such contract upon the faith of the professed agent being duly authorised, that the authority which he professes to have does, in point of fact, exist." It will be observed that the liability in such a case as that of *Collen v. Wright*, arises *ex contractu*, and not *ex delicto*. Indeed, if it were a pure case of tort, from which no benefit had been derived by Wright's estate, the executors could not have been held responsible for it (a).

Liability depends on an implied contract.

Liability of a Principal for the Fraud of his Agent.—The extent of a principal's liability for the fraud of his agent has been much discussed in our

Principal innocent, agent fraudulent.

(a) *Peck v. Gurney*, L. R. 6 H. of L. 377 ; see *ante*, p. 18.

CHAP. VII. courts. The difficulties connected with the question reached an acute phase in the case of *Udell v. Atherton* (b), where the Court, consisting of four judges, was equally divided. In that case an agent, employed to sell timber on commission, made false and fraudulent representations as to the quality of a log of mahogany, which he knew to be unsound, to the plaintiff, with whom he was negotiating for the sale of it. By these representations the plaintiff was induced to buy the log for a sum exceeding its real value. The principal neither authorised nor knew of the fraudulent conduct of the agent. The purchaser, having cut up the log, discovered its unsoundness, and brought an action of deceit against the principal. He was nonsuited at the trial, and, the Court in banc being equally divided, the nonsuit stood.

Barwick v. English Joint-Stock Bank (c) materially helps to solve the difficulties that have arisen on this point. The plaintiff in that case, who had for some time supplied a customer of the bank with oats, on credit, for carrying out a Government contract, refused to continue to do so unless he got a satisfactory guarantee from the bank. Thereupon the manager gave a guarantee that the customer's cheques in favour of the plaintiff, in payment for the oats supplied, should be paid on receipt of the Government money in priority to any other payment, "except to this bank." The customer then owed the bank £12,000, a fact which was in no way communicated to the plaintiff, and the whole of the Government cheque paid in by the customer to his account was appropriated by the bank, so that a cheque which he gave the plaintiff was dishonoured. The Court held that there was evidence of fraud on the part of the manager to go before a jury, and that the bank would be liable for such fraud. Willes, J., delivering the

(b) 7 H. & N. 172.

(c) L. R. 2 Ex. 259.

judgment of himself and six other judges, said: **CHAP. VII.**
 “With respect to the question whether a principal is answerable for the act of his agent, in the course of his master’s business and for his master’s benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed *in the course of the service and for the master’s benefit*, though no express command or privity of the master be proved. The principle is acted upon every day in running-down cases. It has been applied also to direct trespasses to goods.” Having given other instances of its application, the learned judge proceeds: “In all these cases it may be said, as it was said here, that the principal has not authorised the act. It is true he has not authorised the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of the master to place him in.”

The judgment in this case was expressly approved by the Privy Council in *Mackay v. Commercial Bank of New Brunswick (d)*. There an officer of a banking corporation, whose duty it was to obtain the acceptance of bills of exchange in which the bank was interested, fraudulently, but without the knowledge of the president or directors of the bank, made a false representation to the plaintiff, which induced him to accept a bill in which the bank was interested, and which he was afterwards obliged to pay, and it was held that he could recover, in an action brought against the bank, damages for misrepresentation. To the same effect is *Swire v. Francis*, also in the Privy Council (e); and the principle on which *Barwick v. English Joint-Stock Banking Company (f)* was decided

(d) L. R. 5 P. C. 394.

(e) 3 App. Cas. 106.

(f) *Ubi supra*.

CHAP. VII. was again affirmed by the House of Lords in *Houldsworth v. City of Glasgow Bank* (g). There are no doubt what at first sight would appear to be *dicta* inconsistent with this principle in *Western Bank of Scotland v. Addie* (h), but we may gather from the judgments in the case just now referred to that those *dicta* should be confined to cases of a similar class to *Addie*'s, where a member of an incorporated company, who is still a member and liable as a contributory, and for whom the time for rescission of the contract by which he became a member has gone by, seeks to charge the company with a fraud of its directors or agents. In such a case it is impossible for him, as one member of the company, to throw upon the rest of the members the burden of bearing the aliquot share due from him for payment of the whole of the debts and liabilities of the company.

Must the Principal, to be liable, derive Benefit from the Fraud of the Agent?—Some expressions in the leading cases above referred to, and in others, may seem to shew that there is some doubt upon this point (i). But it is submitted that it is not necessary to shew that the principal sought to be made responsible has actually received any benefit from his agent's fraud. In *Barwick's case* the master is said to be answerable for every such wrong of the servant or agent as is committed *in the course of the service and for the master's benefit*, and nothing is said indicating that some benefit must have been actually received. Again, in *Swire v. Francis* (k), the agent, whilst acting in the course of his employment, committed a fraud, for which the principal was held answerable, although he received no benefit whatever from the fraud, the agent having himself obtained the fruits of it.

(g) 5 App. Cas. 317.

(h) L. R. 1 H. of L. (Sc.), 145.

(i) See and cf. *Western Bank of Scotland v. Addie*, L. R. 1 H. of L. (Sc.), 145; *Swift v. Jewsbury*, L. R. 9 Q. B. 301, at p. 312; *Houldsworth v. City of Glasgow Bank*, 5 App. Cas. 317, at pp. 328, 329.

(k) 3 App. Cas. 106.

Liability of a Principal whose Agent innocently makes a Misrepresentation on which Another is induced to act.—Is a principal liable for a representation, innocently made by his agent, which is not true, when the principal knows the real truth? In answer to this, it is, in the first place, clear that if the principal *purposely* employs an agent ignorant of the truth, in order that such agent may innocently make a false statement, believing it to be true, and may so deceive the party with whom he is dealing, the principal will be guilty of a fraud, and a person who has entered into a contract on the faith of the statement cannot be held to it by the principal (l). In the latter of the two cases here cited a son, sent by his father to sell some sheep, represented, as he had authority to do, that they were sound, but they were unsound. The father fraudulently concealed from the son that the sheep were unsound, and intended that the son should sell them at the best price, and for that purpose represent them to be sound. The father was held liable in an action by reason of the misrepresentations which he had fraudulently authorised the son to make.

Cornfoot v. Fowke (m) is a well-known case, but likely to mislead. The plaintiff employed an agent to let a house. He knew, but the agent did not, that the adjoining house was one of bad character. The agent, in answer to a question by the defendant, stated that there was nothing objectionable about the adjoining house. Thereupon the defendant agreed to become tenant of the house, but afterwards, having discovered the character of the next house, he refused to take possession. He was sued for breach of contract, and succeeded in obtaining a verdict, but the verdict was set aside, the Court holding it a misdirection to tell the jury that the principal could not

(l) *Cornfoot v. Fowke*, 6 M. & W. 358; *Ludgater v. Love*, 44 L. T. 694.

(m) 6 M. & W. 358.

CHAP. VII. enforce a contract procured by the false representation of his agent, and that the representation made by the plaintiff's agent had the same effect as if made by the plaintiff himself. The case really turned upon a point of pleading, the defendant having directly charged the plaintiff with fraud. At all events, it has been severely criticised, especially by Lord St. Leonards in *National Exchange Company of Glasgow v. Drew (n)*, where he says :

“Now, supposing there had been in that case no allegation of fraud, but it had been put simply on the ground of misrepresentation, it was not denied in the course of the judgment, as I understand it, that if a principal, with knowledge of a fact which was material to the value of the property, employed an agent, whom he knew to be ignorant of the fact, for the purpose of concealing it, he could not avail himself of that concealment, and he would be responsible. . . . But I should take the liberty of going a good deal further. I should say that if in that case fraud had not been alleged, but it had been put upon misrepresentation, and the fact were that a man knowing that there is so serious a nuisance affecting a house, as to diminish its value in such a way that no man of respectability could live in it, takes care himself not to make the contract, but leaves it to an agent whom he has no reason to suppose is aware of the fact ; and if, in the course of the treaty for the contract, the agent, being asked if such a fact existed, states positively, No, and the contract is executed in silence upon that point, because the purchaser's or the tenant's vigilance has been lulled to sleep upon it, and he believes the representation made to him by the agent. . . . I should hope the law of England would reach a case of that sort. . . . When, upon a matter so material to the value of the property, he left it to his agent to make the

(n) 2 Macq. 103, at p. 145.

representation without informing him of so important a fact within his own knowledge, the agent making a false representation of that fact would bind the principal, and thus impeach the validity of the contract."

Fraudulent Representations as to a Person's Credit.—By s. 4 of the Statute of Frauds (29 Car. II. c. 3) it was enacted (*inter alia*) that "no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person. . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised." This statute therefore required, and still requires, that a guarantee, to be actionable, must be in writing, and signed by the defendant or his authorised agent. Many years, however, after its passing, a case was decided which threatened to make considerable encroachments upon it. If a person were verbally to guarantee payment of a debt about to be contracted by another, this could not *per se* make him liable to an action. But notwithstanding the statute he might make use of expressions containing representations as to that other person's credit and solvency, upon which he could be sued in an action, not of contract, as upon a guarantee, but of tort. And such an action was brought in 1789, the declaration of which stated that the defendant, intending to deceive and defraud the plaintiffs, wrongfully and deceitfully encouraged them to sell goods to one Falch on credit, and for that purpose falsely, deceitfully, and fraudulently asserted to the plaintiffs that the said Falch was a person who might be safely trusted, whereby the plaintiffs were induced to sell him goods on credit, but that he was not, as the defendant well knew, a person who might be safely trusted. That was the well-known case of *Pasley v. Freeman* (o), where it was held that the

(o) 3 T. R. 51 ; 2 Sm. L. C.

CHAP. VII. plaintiffs were entitled to succeed in their action. In consequence of that and other cases, s. 6 of 9 Geo. IV. c. 14, which is commonly known as Lord Tenterden's Act, was passed, by which it was enacted that "No action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon, unless such representation or assurance be made in writing, signed by the party to be charged therewith" (*p*).

It will be observed that under this statute signature by an agent is not sufficient to fix any one except himself with liability. Thus, in *Swift v. Jewsbury* (*q*), a customer of a bank requested its manager to make inquiries respecting the solvency of a person who banked at another bank, and who wished to obtain goods on credit from the customer. The manager of the other bank wrote an answer, signing his letter, and giving an account of the person's solvency which he knew to be false. Upon the faith of it goods were supplied on credit, but were never paid for. It was held that the manager, who made such false statement, but not the bank, was liable.

(*p*) See and *cf.* Scotch Act, 19 & 20 Vict. c. 60, s. 6, and *Glydesdale Bank v. Paton* (1896), App. Cas. 381.

(*q*) L. R. 9 Q. B. 301.

CHAPTER VIII.

SLANDER AND LIBEL.

FORMERLY the word slander embraced not only spoken but written defamation (*a*) ; but in modern days it is confined to defamatory and false words spoken of another to his damage.

CHAP. VIII.

Distinction
between
slander and
libel.

To constitute a libel the false and defamatory matter must be written or printed or put into some form, such as a painting (*b*).

Except in cases where the law presumes damage, an action for slander cannot be maintained without proof by the plaintiff of special damage.

Thus, as Lord Campbell regretted in *Lynch v. Knight* (*c*), according to the unsatisfactory state of our law at that time, an imputation by words, however gross, on an occasion however public, upon the chastity of a modest matron or a pure virgin, was not actionable without proof that it had actually produced special temporal damage to her (*d*).

Special Damage.—The special damage that has to be proved, where the law does not presume damage, must be temporal, and not too remote.

As to what
damage will
support an
action.

Thus, for example, under the former state of the law, a wife might have maintained an action against a third person for defamatory words occasioning to

(*a*) See Bacon's Abridgement : Slander.

(*b*) *O'Brien v. Clement*, 15 M. & W. 435 ; *Du Bost v. Beresford*, 2 Camp. 511. See *Monson v. Tussard* (1894), 1 Q. B. 671.

(*c*) 9 H. of L. Cas. 577, at p. 593.

(*d*) There was an exception to this in the case of such slanders uttered within the jurisdiction of the local courts of the City of London and Bristol.

CHAP. VIII. her the loss of the *consortium* or conjugal society of her husband, but the words must have been such that the loss of the *consortium* would follow as a natural and reasonable consequence (*e*). And where words were spoken imputing unchastity to a woman, and by reason thereof she was excluded from a private society and congregation of Protestant dissenters, of which she was a member, and was unable to obtain a certificate without which she could not become a member of another society of the same kind, it was held that sufficient special damage had not been shown (*f*). Nor would illness occasioned by a false charge of unchastity, verbally made, have been sufficient (*g*). But if by reason of such a slander a woman lost her marriage (*h*), or were deprived of the gratuitous hospitality of her friends (*i*), an action would have lain, but not for the loss of their society simply (*k*). But, as we shall see, it is not now necessary to prove special damage in this class of actions.

Chamberlain v. Boyd (*l*) is a useful case on the question of special damage and remoteness of damage. In that case the plaintiff was a defeated candidate for election to a club. Subsequently to such defeat of the plaintiff a meeting of the members was called to consider proposed alterations in the rules with regard to the election of new members. The defendant thereupon, it was alleged in the Statement of Claim, uttered defamatory statements respecting the plaintiff, whereby he induced, or contributed to induce, a majority of the members of the club to retain the rules under which the plaintiff had been defeated, and so prevented the plaintiff from again seeking to be

(*e*) *Lynch v. Knight*, 9 H. of L. 577 ; but see the judgment of Lord Wensleydale.

(*f*) *Roberts and Wife v. Roberts*, 5 B. & S. 384.

(*g*) *Allsop v. Allsop*, 5 H. & N. 534.

(*h*) *Davis v. Gardiner*, Coke, Rep. part iv. 16 b.

(*i*) *Davies and Wife v. Solomon*, L. R. 7 Q. B. 112.

(*k*) *McIlharrist v. Bulam*, 1 Sid. 397 ; *Barnes v. Bruddel*, 1 Lev. 261.

(*l*) 11 Q. B. D. 507.

elected to the club. The Statement of Claim was successfully demurred to on two grounds. The first ground was, that the damage alleged was unsubstantial and shadowy, and incapable of being estimated in money. Possibly, as the Court points out, the membership of a club may be a matter of temporal advantage, and the deprivation of it may be an injury or damage of which the law will take cognisance; but it was not alleged that the defendant's words prevented the election of the plaintiff, but only that they contributed to induce a majority of the members to retain the rules under which the plaintiff had once been defeated. The second ground on which the demurrer was held good was, that the alleged damage was too remote. The Court held that it was almost absurd to suppose that, because the members of a club believed that the plaintiff had misconducted himself at a club in Melbourne (as was alleged by the defendant), they would refuse to alter their rules as to the mode of election.

In considering the question of special damage some reference should be made to the leading case of *Vicars v. Wilcocks* (m), and to the subsequent modifications of the law as there laid down. In that case it was held that in proving special damage to maintain an action of slander, it is not sufficient to prove a mere wrongful act of a third person induced by the slander, such as that he dismissed the plaintiff from his employment; but that the special damage must be the "legal and natural" consequence of the slander. That this rule is too restricted, and that a slanderer may be liable for the consequences to the plaintiff of a third person's illegal act, where he might have anticipated that such illegal act would follow from his slanderous words, may be gathered from *Lynch v. Knight* (n). To make the words actionable by reason of special damage, the consequence must be such as, taking

(m) 8 East 1, 2 Sm. L. C. 506.

(n) 9 H. of L. Cas. 577, at p. 600.

CHAP. VIII. human nature as it is, with its infirmities, and having regard to the relationship of the parties concerned, might fairly and reasonably have been anticipated and feared would follow from the speaking of the words—not what would reasonably follow, or what we might think ought to follow.

Defamatory Words actionable without Proof of Special Damage.—Words imputing a crime, words imputing a contagious disease of such a character as to exclude a person from society, words reflecting on a man in his profession, trade, or business, or some office held by him, and words imputing unchastity to a woman or girl, are actionable without proof of special damage.

(1) Words imputing a crime.

Where the words impute a crime, it is not necessary that the offence imputed should be an indictable one, as is sometimes stated in text-books; indeed, if it were so, a difficulty would arise from the fact that many offences which were formerly dealt with by indictment are now disposed of summarily by magistrates. But the correct rule seems to be, that it is actionable slander to say of a person that he has done something for which he can be made to suffer corporally, though it is not actionable to say that he has done something which may render him liable to the mere infliction of a fine (o).

As will be seen hereafter, the truth of a slander or libel will be a good defence to an action for damages brought in respect of it. But where a person has suffered his punishment, or has been pardoned for a crime formerly committed by him, it is no longer justifiable to impute to him that crime. Thus in *Cuddington v. Wilkins* (p), the plaintiff sued the defendant for calling him “a thief.” The defendant justified by pleading that the plaintiff had stolen six

(o) *Webb v. Beavan*, 11 Q. B. D. 609.

(p) Hob. 67, 81.

sheep. The plaintiff set up a general pardon of 7 CHAP. VIII.
James I., and succeeded in his action, though the defendant knew not of the pardon, "for there is no cause to favour idle and injurious words." Again, to write of the editor of a newspaper that he is "a convicted felon" and "a felon editor," was held not justifiable, where the conviction had taken place many years previously, and the punishment therefor had been endured (q).

Words imputing a contagious disease, to be actionable without proof of special damage, must impute that at the time of the uttering of the words the person referred to had a contagious disease of such a character as to exclude him from society, and words imputing that he at some time had such a disease will not *per se* be sufficient foundation for an action (r).

(2) Words imputing a contagious disease.

Imputations on a Man in the way of his Profession, Trade, Business, or Office.—In order that such words may be actionable *per se*, it is necessary, in the first place, that the person concerning whom they were uttered was, at the time they were so uttered, carrying on his profession, trade, or business, or filling his office (s). In the latter case, a declaration for slander, by charging a clergyman in holy orders with immorality, was held bad, because it did not shew special damage, or that the clergyman held at the time some benefice or office producing temporal emolument.

(3) Words casting imputations on a man in the way of his profession, trade, office, or business.

It is important to bear in mind the distinction between what is actionable in the case of an office of honour or credit (such as a town councillor's), and what in the case of an office of profit. Where an imputation is made, not of misconduct in an office of honour or credit which a man holds, but of unfitness

(q) *Leyman v. Latimer*, 3 Ex. D. 352.

(r) *Carslake v. Mapledoram*, 2 T. R. 473.

(s) *Bellamy v. Burch*, 16 M. & W. 590; *Gallwey v. Marshall*, 9 Ex. 295.

CHAP. VIII. for that office, an action will not lie unless the conduct charged be of such a kind that by reason of it he could be removed from or deprived of that office. Thus, to say of a town councillor that he is habitually drunk and not fit to be in the council, would not be actionable without special damage (*t*). But words imputing misconduct, such as dishonesty, or malversation or want of integrity in a public office of honour or credit, whether one of profit or not, are actionable without special damage, and that too whether there is a power of removal from the office for such misconduct or not (*u*).

Again, an imputation on a man in the way of his profession, trade, business, or office, must, to be actionable without special damage, *touch* him in his profession, trade, business, or office. Thus, where a person verbally said respecting the clerk of a gas company that he was a person of gross immorality, and thereby unfit to hold his situation, it was held that the words were not actionable, because the imputation contained in them did not imply the want of any of those qualities which a clerk ought to possess, such as honesty, or capacity, or fidelity. On the same principle, a physician has failed to obtain redress for a charge of adultery made against him, where nothing was alleged in the declaration to connect the imputation with his professional conduct (*v*); and it has been held not actionable to impute prostitution to a school-mistress (*y*), though possibly (even without the Slander of Women Act, 1891), no such outrageous decision would be upheld at the present day.

When it was said of a solicitor, "he has defrauded his creditors, and has been horsewhipped off the course at Doncaster," the solicitor failed to obtain

(*t*) *Alexander v. Jenkins* (1892), 1 Q. B. 797.

(*u*) *Booth v. Arnold* (1895), 1 Q. B. 571.

(*v*) *Ayre v. Craven*, 2 A. & E. 2.

(*y*) See *Wharton v. Brook*, 1 Ventr. 21.

redress, as the jury found that, though the words had a tendency to injure him morally and professionally, they were not spoken of him in his business of a solicitor (z). CHAP. VIII.

And where the defendant said of the plaintiff, who was a working stonemason, "He was the ringleader of the nine hours' system," "he has ruined the town by bringing about the nine hours' system," "he has stopped several good jobs from being carried out by being the ringleader of the system at Llanelly," it was held that an action was not maintainable, for the words were not actionable in themselves, and not connected with the plaintiff's trade either by averment or by necessary implication (a).

But it is actionable to say of a justice of the peace, "He hath taken money of a thief to keep him from gaol," or "I never could have justice of him, but always injustice," or "he is a partial justice," or "he wrests the law and perverts justice to serve his own turn" (b). So is it actionable to say of a solicitor that he is grossly ignorant of law, or that he deceives those who trust him (c); or of a physician, that he is a quacksalver or a mountebank (d); or of a gamekeeper, that he trapped foxes (e); or of a person engaged in trade that he has been, or is, or is about to become, a bankrupt, or is unable to pay his debts (f).

It is also actionable to say of a trader that he uses false weights or measures, adulterates his goods, or is guilty of other malpractices (g).

(z) *Doyley v. Roberts*, 3 Bing. N. C.

(a) *Miller v. David*, L. R. 9 C. P. 118.

(b) Comyns, Digest, vol. i. p. 373; Action upon the Case for Defamation, D. 15.

(c) *Ibid.* D. 24.

(d) *Ibid.* D. 23.

(e) *Fulger v. Newcomb*, L. R. 3 Ex. 327.

(f) Comyns, Digest, *ubi supra*, D. 25; *Leycroft v. Dunker*, Cro. Car. 317; *Brown v. Smith*, 13 C. B. 596.

(g) Comyns, Digest, *ubi supra*, D. 26, 27; *Griffiths v. Lewis*, 7 Q. B. 61.

CHAP. VIII.

(4) Slander of
omen.

By the Slander of Women Act, 1891 (*h*), special damage is no longer necessary to render actionable words spoken and published which impute unchastity or adultery to any woman or girl, but the plaintiff is not to recover more costs than damages, unless the judge certifies that there was reasonable ground for bringing the action.

Plaintiff
need not prove
special
damage.

Libel.—A fifth case in which a plaintiff is not obliged to prove special damage in order to succeed in an action against a person who has defamed him is where the defamatory matter is in writing or print, or otherwise put into some permanent and visible form. It is needless now to inquire into the cause of the distinction between slander and libel, and why in so many cases an action may be maintained for a written slander which could not be maintained for the words if they had been merely spoken. Some of the reasons given will not to some minds seem very satisfactory; for instance—(1) that a libel is permanent, and may circulate amongst innumerable hands; (2) that it shews greater malignity on the part of its author than a slander; or (3) that it is more likely to lead to a breach of the peace (*i*).

Libel—defini-
tion.

Libel has been defined as “a publication, without justification or lawful excuse, which is calculated to injure the reputation of another by exposing him to hatred, contempt, or ridicule” (*k*). In a more recent case (*l*), Lord Blackburn says: “A libel for which an action will lie is defined to be a written statement, published without lawful justification or excuse, calculated to convey to those to whom it is published an imputation on the plaintiffs, injurious to them in their trade, or holding them up to hatred, contempt, or ridicule.”

(*h*) 54 & 55 Vict. c. 51. The Act is not applicable to Scotland.

(*i*) See Folkard on Slander and Libel, 4th ed., p. 154.

(*k*) *Permiter v. Crompton*, 6 M. & W. 105.

(*l*) *Capital and Counties Bank v. Henty*, 7 App. Cas. 741. at p. 771.

“ Although a corporation cannot maintain an action for libel in respect of anything reflecting upon them personally, yet they can maintain an action for a libel reflecting on the management of their trade or business, and this without alleging or proving special damage” (*m*). For example, a corporation cannot sue in respect of a charge of murder, or adultery, or corruption, or assault, because a corporation cannot be guilty of these things, although the individuals composing the corporation may be: but a corporation may sue in respect of a libel calculated to injure them in the way of their business (*m*).

CHAP. VIII.

Action by
Corporation.

The plaintiff in an action for libel or slander ought to set out in his statement of claim the very words which have been used, and it will not be sufficient to describe them by their usual substance and effect (*n*).

It is for the plaintiff (or for the prosecutor where criminal proceedings are taken for a libel), to make out that the words complained of bear the meaning which he attributes to them (*o*). Thus an action was brought for the following alleged libel published in a newspaper:—“ Walsall Science and Art Institute.—The public are respectfully informed that Mr. Mulligan’s connection with the institute has ceased, and that he is not authorised to receive subscriptions on its behalf.” The innuendo or meaning ascribed by the plaintiff to these words was that the plaintiff had falsely pretended to be authorised to receive subscriptions on behalf of the institute. A nonsuit was directed, and was afterwards upheld by the Court on the ground that the advertisement was not capable of the defamatory meaning attributed to it by the plaintiff.

Plaintiff must
prove that
words are
libellous.

With regard to the *innuendo* or meaning given by the plaintiff to the words he complains of, the separate

Functions of
judge and
jury.

(*m*) *South Hetton Coal Company, Limited v. North Eastern News Association, Limited* (1894), 1 Q. B. 133, at p. 141.

(*n*) *Harris v. Warre*, 4 C. P. D. 125.

(*o*) See *Mulligan v. Cole*, L. R. 10 Q. B. 549.

CHAP. VIII. functions of the judge and jury must not be lost sight of. "It is the duty of the judge to say whether a publication is *capable* of the meaning ascribed to it by an innuendo; but when the judge is satisfied of that, it must be left to the jury to say whether the publication has the meaning so ascribed to it" (*p*). "If the judge, taking into account the manner and the occasion of the publication, and all other facts which are properly in evidence, is not satisfied that the words are capable of the meaning ascribed to them, then it is not his duty to leave the question raised by the innuendo to the jury. In deciding on the question whether the words are capable of that meaning, he ought not, in my [*i.e.*, Lord Selborne's] opinion, to take into account any mere conjectures, which a person reading the document might possibly form, as to some out of various motives or reasons which might have actuated the writer, unless there is something in the document itself, or in other facts properly in evidence, which to a reasonable mind would suggest, as implied in the publication, those particular motives or reasons" (*q*). Thus, in an action of libel or slander, if the defendant can get either the Court or the jury to be in his favour, he succeeds. The prosecutor or the plaintiff cannot succeed unless he gets both the Court and the jury to decide for him (*r*). And if words may bear other interpretations as fairly as the libellous one which the plaintiff or prosecutor attributes to them, he cannot succeed in his action or prosecution. "It is unreasonable that when there are a number of good interpretations, the only bad one should be seized upon to give a defamatory sense to the document" (*s*).

Intention of Person using the Words.—In construing words, to see whether they are libellous or

(*p*) *Sturt v. Blaggy*, 10 Q. B. at p. 908.

(*q*) *Capital and Counties Bank v. Henty*, 7 App. Cas. 741, 744.

(*r*) *Ibid.* 776.

(*s*) *Ibid.* 786.

not, the Court, where nothing is alleged to give them an extended sense, will put that meaning on them which the words would be understood by ordinary persons to bear, and say whether the words so understood are calculated to convey an injurious imputation. The question is not whether the defendant *intended* to convey that imputation; for if he, without excuse or justification, did what he knew, or ought to have known, was calculated to injure the plaintiff, he must (at least civilly) be responsible for the consequences, though his object might have been to injure a person other than the plaintiff, or though he may have written in levity only. "No one can cast about firebrands and death, and then escape from being responsible by saying he was in sport" (t).

The facts in the case of the *Capital and Counties Bank v. Henty (u)*, already mentioned, will illustrate the rule above laid down. The defendants, Henty and Sons, were in the habit of receiving from their customers cheques on various branches of the plaintiff bank, which the plaintiff bank cashed, for the convenience of the defendants, at a particular branch at the place where the defendants carried on their business. A new manager having been appointed to that branch, the defendants had a misunderstanding with him as to the cashing of such cheques, and thereupon sent a printed circular to a large number of their customers, who knew nothing of this misunderstanding, in the following words: "Messrs. Henty & Sons hereby give notice that they will not receive in payment cheques drawn on any of the branches of the Capital and Counties Bank." This circular became known to some other persons, and there was a run on the bank, and loss sustained. The bank accordingly brought an action for libel, alleging, by way of innuendo, in their Statement of Claim, that the circular imputed

(t) *Capital and Counties Bank v. Henty*, 7 App. Cas. at p. 772.

(u) 7 App. Cas. 741.

CHAP. VIII. that they were not to be relied upon to meet the cheques drawn on them, and that their position was such that they were not to be trusted to cash the cheques of their customers. The House of Lords (Lord Penzance dissenting), affirming the judgment of the Court of Appeal, held that the case ought not to have been left to the jury, for the words in themselves did not bear the libellous meaning ascribed to them, nor would reasonable men collect such a meaning from them. So, too, where an insurance company on a privileged occasion wrote a circular stating that the agency of A. had been closed by the directors, and sent it to those who had insured at that agency, giving them directions where to apply in future, it was held that there was no libel (*x*).

Publication.—As there is no slander till the defamatory words are uttered, so there is no libel for which an action can be brought till the libel has been published. Such publication must be to at least one person other than the plaintiff in an action (though in the case of an indictment, publication to the party himself may be sufficient) (*y*), and so if the libellous matter be delivered in a sealed letter to the plaintiff, there is no publication sufficient for an action (*z*). Nor is there if it is handed, folded up, but unsealed, to a third person for delivery to the plaintiff, and such third person so delivers it without reading it himself or suffering any one else to read it (*a*). But if the libellous matter be sent by telegraph or on the back of a postcard addressed to the plaintiff, there will necessarily be publication (*b*). And there was held to be evidence of publication where the defendant, knowing that the plaintiff's letters were in his absence

(*x*) *Nevill v. Fine Art and General Insurance Company* (1897), App. Cas. 68.

(*y*) *Clutterbuck v. Chaffers*, 1 Stark. 471.

(*z*) *Barrow v. Leicellin*, Hob. 62.

(*a*) *Clutterbuck v. Chaffers*, 1 Stark. 471.

(*b*) *Williamson v. Freer*, L. R. 9 C. P. 393; *Robinson v. Jones*, L. R. 4 Ex. (Ir.), 391.

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opened by his clerk, sent a libellous letter, directed to the defendant, which was opened by the clerk (c). Where libellous matter, dictated by a merchant to a shorthand clerk and type-written by him, is sent by letter to a firm, and the letter is opened by a clerk in the ordinary course of business, there is a double publication, and, as will be seen hereafter, privilege cannot be relied on by the libeller, for neither clerk has an interest in seeing the libellous matter (d). But where a solicitor, acting on behalf of a client, sent to the plaintiff a libellous letter, which he had dictated to his shorthand clerk, and which was copied by another clerk into the letter book, it was held that though there was publication to the two clerks the occasion was privileged. If the solicitor had written direct to the plaintiff there would clearly have been privilege, for he would have been acting for and in the interest of his client, and the publication to his two clerks was reasonably necessary and usual in the course of his business (e). The sending of a libel to the plaintiff's wife is as much a publication as if it were sent to a stranger (f); and it is submitted, notwithstanding the doubt expressed by Jervis, C.J., in the case last mentioned, that there is sufficient publication if a libel on a wife is sent to her husband.

Repetition.—*Primâ facie*, the repetition of a libel or slander is actionable, nor will it be any justification that the person guilty of such repetition gives the name of the person who originally published the defamatory matter (g). In *Watkin v. Hall* (g) the plaintiff was the chairman of the South-Eastern Railway Company, and the defendant, with reference to him and to a fall in the shares of the company, used the following

(c) *Delacroix v. Thevenot*, 2 Stark. 63.

(d) *Pullman v. Hill & Company* (1891), 1 Q. B. 524.

(e) *Boxius v. Goblet Frères and others* (1894), 1 Q. B. 842 (Malice was negatived).

(f) *Wenman v. Ash*, 13 C. B. 836.

(g) *De Crespigny v. Wellesley*, 5 Bing. 392; *M'Pherson v. Daniels*, 10 B. & C. 263; *Watkin v. Hall*, L. R. 3 Q. B. 396.

CHAP. VIII. words : “ You have heard what has caused the fall ; I mean the rumour about the South-Eastern chairman having failed.” A plea that the defendant meant, and was understood by the bystanders to mean, that there was a rumour current on the Stock Exchange about the chairman of the company having failed, and not that the plaintiff had become insolvent, and that there was such a rumour current, was held to be bad, for that the existence of the rumour did not justify the repetition of the slander contained in it, unless it were shewn that the defendant believed it to be true, and that he spoke the words on a privileged occasion. “ It is no justification to a person, in giving currency to that which is injurious to the character of another, for him to say that he heard the statement made by another person. If he justifies at all, he must shew that he made the communication under circumstances that gave it a privileged character, that he was justified in making that privileged communication, or that the words themselves, when he spoke the words, were true ” (h).

Justification of a Libel where Civil Proceedings have been taken.—If a plaintiff seeks to recover damages for defamatory matter uttered or spoken of him, the defendant may set up in his defence that the defamatory matter was true, and such a defence, if pleaded and fully proved, will enable him to succeed at the trial ; “ for the law will not permit a man to recover damages in respect of an injury to a character which he either does not, or ought not to, possess ” (i). The truth is an answer to the action, not because it negatives malice on the part of the defendant (for a person may wrongfully and maliciously utter libellous matter, though true, and thereby subject himself to an indictment), but because it shews that the plaintiff is

Truth of libel
may be
pleaded in
defence.

(h) Per Lush, J., *Watkin v. Hall*, *ubi supra* ; cf. *Speight v. Gosney*, 60 L. J. Q. B. 231.

(i) *McPherson v. Daniels*, 10 B. & C. 263, at p. 272.

not entitled to recover damages (*k*). But a defendant who means to rely on such a defence must specially plead it, and prove it in every material particular. Thus, for example, in *Mountney v. Watton* (*l*), the libel complained of, and which had been published in a newspaper, was as follows: "Horse-stealer.—Charles Mountney, a native of Derby, was taken into custody in this town on Saturday night, on suspicion of having stolen a grey horse, the property of Mr. Thos. Adderley, of Stone, Shropshire. Information was given to Mr. Bowdler, solicitor, who happened to be constable for the night, that such a character was at the White Horse, Frankwell. Mr. Bowdler, with Hayward, the police officer, went in search of him, and found him asleep in bed. Hayward awoke him, and asked him where he left the grey horse. He immediately answered, 'Chester'; but on looking round, and observing who put the question, he denied all knowledge of the horse." The innuendo put on the words was that the defendant meant to charge the plaintiff with stealing the horse. The defendant set up the truth of the libel except as to the word "horse-stealer." The plaintiff demurred to the plea, and the demurrer was upheld, as the gist of the libel was contained in the word "horse-stealer," which the defendant did not justify.

So where, the plaintiff's ship being advertised for freight and passengers, the defendant published in the *Times* that she was unseaworthy, and had been bought by Jews to take out convicts; and the defendant, upon an action of libel being brought against him, pleaded to the whole declaration that the ship had been shewn to be unseaworthy, but made no reference to her having been sold to Jews to take out convicts; it was held that the plea could not be supported as an answer to the whole libel (*m*).

(*k*) *Ibid.*

(*l*) 2 B. & Ad. 673.

(*m*) *Ingram v. Lawson*, 5 Bing. N. C. 66.

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But it will be a question for the jury whether the statement charged as libellous is substantially true, and a slight inaccuracy, such as stating that a person was sentenced to three weeks' imprisonment, when the sentence was only for a fortnight, will not necessarily enable the party complaining of it to succeed in an action (*n*).

Where libel consists partly of undoubted fact and partly of comment thereon.

Again, a libel may consist partly of undoubted fact and partly of comment, and though it often happens that the whole sting and injury of the libel are in the comment, yet there are cases where the inference is so fair, that if you prove the fact, you prove the correctness of the comment. If, for instance, the publication were, "He murdered his father, and therefore is a disgrace to human nature," the latter words would be a fair comment on the previous ones, and nothing material could turn upon them in an action. But if the comment infer a new fact, the defendant must abide by that inference of fact, and the fairness or unfairness of the comment must be determined by the jury (*o*).

Although a justification of a libel must be complete, yet where a libel contains several distinct charges, a defendant may plead the truth of one or any more of these charges, but he may be liable in damages for any which he has omitted to justify (*p*).

Justification of a Libel where Criminal Proceedings have been taken.—Although, as we have seen, a plaintiff cannot recover damages in a civil court for a libel which has been proved to be true, yet it was formerly no defence to an indictment or criminal information for a libel that the libel was true. Indeed, it was formerly a maxim that "the greater the truth

(*n*) *Alexander v. North-Eastern Railway Company*, 6 B. & S. 240.

(*o*) *Cooper v. Larson*, 8 A. & E. 746, 753.

(*p*) *Clarke v. Taylor*, 2 Bing. N. C. 654. Where justification is pleaded the facts on which reliance is placed in support of the plea must be set out; *Zierenberg v. Labouchere* (1893), 2 Q. B. 183.

the greater the libel," for a libel that was true was even more likely to provoke a person to a breach of the peace than one which was false. But now, by Lord Campbell's Libel Act, 6 & 7 Vict. c. 96, it is provided that on the trial of any indictment or information for a defamatory libel, the defendant may plead the truth of the matters charged, that their publication was for the public benefit, and the facts by reason of which he alleges that such publication was for the public benefit (sec. 6); so that even still where criminal proceedings are taken for a libel, the truth will not be an answer unless the publication of the libel was also for the public benefit. All the statutory conditions must be fulfilled before the truth can become a defence. And so the only stage at which evidence of the truth can be received is when a plea drawn in accordance with the requirements of the statute has been put in, or, in other words, at the trial of the indictment. For this reason it has been held that magistrates at the hearing in the police court have no jurisdiction to admit evidence of the truth of the libel, their duty being simply to determine whether the case is one which they ought to send for trial (*q*). If, however, the libel complained of be in a newspaper, magistrates may receive evidence as to the publication being for the public benefit, and as to the truth of the libel, and as to the report being fair and accurate, and published without malice, and as to other matters which might be given in evidence on the defence of a person charged in an indictment, and if the magistrates are of opinion, after hearing such evidence, that there is a strong or probable presumption that a jury would acquit the person charged, they may dismiss the case (*r*). No criminal prosecution can be commenced against the proprietor, publisher, editor, or any person responsible for the publication of a newspaper, for any libel published in it, unless an order shall have been first

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Application of maxim, "The greater the truth the greater the libel."

Publication of libel must be for the public benefit.

Libel in newspaper.

(*q*) *Regina v. Curden*, 5 Q. B. D. 1.

(*r*) 44 & 45 Vict. c. 60, s. 4.

CHAP. VIII. obtained from a judge in chambers, notice of the application for which must be given to the person accused (s).

Privilege.—It may often be a good defence to an action for libel or slander that the libel was written or the slander uttered on an occasion which was privileged; that is, when the circumstances afforded the defendant an excuse sufficient in the eye of the law for writing the libel or uttering the slander. In some cases this privilege is *absolute*, and when clearly established is a complete defence; in other cases it is only *qualified*, and will not be a good defence if the plaintiff succeed in proving actual malice.

I. Absolute Privilege.—The cases of absolute privilege may generally be summarised under the heads of parliamentary proceedings, judicial proceedings, military or naval proceedings, and communications on state matters made by one minister to another, or to the Crown.

(a) Parliamentary proceedings.

Statements made by members of either House of Parliament in their places in the House, though such statements may be untrue to their knowledge, cannot be made the foundation of civil or criminal proceedings, however injurious they may be to the interests of a third person. And a conspiracy to make such statements would not make the persons guilty of it amenable to the criminal law (t). But though a member of Parliament may in his place in the House say boldly and fearlessly whatever he thinks may produce an effect, and cannot be made answerable in an action of slander for words so spoken, yet he is liable for what he says elsewhere, and he may be sued for subsequently publishing defamatory matter uttered in the House, even though such publication were for the purpose of correcting a newspaper version of his

(s) 51 & 52 Vict. c. 64, s. 8.

(t) *Ex parte Wason*, L. R. 4 Q. B. 573.

words (*u*). But if a speech delivered in Parliament were *bonâ fide* published by a member for the information of his constituents, it would be privileged (*x*). CHAP. VIII.

A petition to Parliament is also absolutely privileged (*y*), and by 3 & 4 Vict. c. 9, complete protection is given to persons who, acting by order or under the authority of either House of Parliament, publish such reports, papers, votes, or proceedings of that House as it may have deemed fit or necessary to be published.

It has been laid down in general terms that "neither party, witness, counsel, jury, or judge can be put to answer civilly or criminally for words spoken *in office*" (*z*). Accordingly, the Court quashed an indictment against a justice of the peace for saying to the grand jury at sessions: "You have not done your duty; you have disobeyed my commands; you are a seditious, scandalous, corrupt, and perjured jury" (*z*). With regard to a judge, it has been well established by a series of decisions that no action will lie against him for any words spoken by him whilst sitting in his judicial capacity in a court of justice, even though the plaintiff alleges that the words were spoken maliciously, and without reasonable or probable cause (*a*); and so an action for slander was held to be not maintainable where a judge was alleged to have said to the plaintiff, "You are a harpy, preying on the vitals of the poor" (*a*). (*b*) Judicial proceedings.

But a meeting of the London County Council for granting music and dancing licences is a meeting for performing administrative and not judicial functions, and so statements made thereat by a member are not absolutely privileged. Such member is only entitled

(*u*) *Rex v. Creevey*, 1 M. & S. 273.

(*x*) See *Wason v. Walter*, L. R. 4 Q. B. 73, at p. 95.

(*y*) *Lake v. King*, 1 Mod. 58.

(*z*) *Rex v. Skinner*, Loft, 55; see also *Dawkins v. Rokeby*, L. R. 7 H. of L. 744.

(*a*) See *Scott v. Stansfield*, L. R. 3 Ex. 220.

CHAP. VIII. to the qualified privilege which exists where a statement is made on a privileged occasion, *bonâ fide*, and without malice (*b*).

Advocates. Words spoken by an advocate before a court of justice with reference to and in the course of a judicial inquiry, though uttered maliciously—that is to say, not with the object of supporting his client's case—and without any justification, or from personal ill-will towards the person defamed, and irrelevant to the issues of fact before the Court, are absolutely privileged, and no action can be brought in respect of them (*c*).

Witnesses. The evidence of a witness given in a court of justice with reference to the inquiry or case which is there proceeding, even if it be malicious, is privileged, and a civil action cannot be brought in respect of it; but he is not necessarily protected if he states something altogether out of the character and sphere of a witness, or *dehors* the matter in hand. Thus, for example, if whilst the witness is in the box a man were to come in at the door, and the witness were to exclaim, "That man picked my pocket," such an expression as that, made without reference to the matter in hand, would hardly be privileged (*d*).

(*c*) **Military or naval proceedings.** The same immunity from actions which is given to witnesses before the ordinary courts of justice is extended to military or naval men, so far as relates to the evidence given and the reports handed in by them as witnesses relative to the subject of inquiry before a court-martial or other properly constituted court of inquiry held to consider some matter of naval or military discipline (*e*).

(*b*) *Royal Aquarium Society, Limited v. Parkinson* (1892), 1 Q. B. 431.

(*c*) *Munster v. Lamb*, 11 Q. B. D. 588; see also *Pedley v. Morris*, 65 L. T. 526, where written objections to a solicitor's bill of costs were held privileged.

(*d*) *Seaman v. Netherclift*, 1 C. P. D. 540, 2 C. P. D. 53.

(*e*) See *Darwins v. Rokeby*, L. R. 7 H. of L. 744; see also *Darwins v. Paulet*, L. R. 5 Q. B. 94.

Lastly, for reasons of public policy, every communication relating to state matters, made by one minister to another, or to the Crown, is absolutely privileged (*f*).

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(*d*) Matters of state.

II. *Qualified Privilege*.—In cases of absolute privilege, as we have seen, even the existence of actual malice, or malice in fact, will not destroy the protection given by such privilege. But there are cases where the privilege is only qualified; that is to say, it affords *prima facie* a protection to a defendant sued for defamation, so that a plaintiff, in order to render the defendant liable for such defamation, must prove actual malice. Malice in law exists where there is a wrongful act done intentionally, without just cause or excuse (*g*); and it is implied where a person is libelled, or where slander of an actionable kind is uttered against him. But if the occasion of the libel or slander be privileged, the presumption of malice is rebutted, and the onus of proving malice in fact lies on the plaintiff (*h*). Even a finding of the jury that the privilege has been exceeded will not be sufficient for the plaintiff unless they also find malice (*i*). Perhaps the most succinct exposition of the law on this subject will be found in the judgment of Parke, B., in *Toogood v. Spyring* (*k*): “In general, an action lies for the malicious publication of statements which are false in fact and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious unless it is fairly made by a person in the discharge of some public or private duty, whether legal or

Malice in law.

Malice in fact.

(*f*) *Chatterton v. Secretary of State for India* (1895), 2 Q. B. 189.

(*g*) *Bromage v. Prosser*, 4 B. & C. 247.

(*h*) *Ibid.*; *Capital and Counties Bank v. Henty*, 7 App. Cas. 741; *Jenoure v. Delmege* (1891), App. Cas. 73. A jury may infer malice where from anger or some other wrong motive a person makes a defamatory statement, without caring whether it is true or not; *Royal Aquarium Society, Limited v. Parkinson* (1892), 1 Q. B. 431.

(*i*) *Nevill v. Fine Art and General Insurance Company* (1897), App. Cas. 68.

(*k*) 1 C. M. & R. 181, 193.

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moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases the occasion prevents the inference of malice which the law draws from unauthorised communications, and affords a qualified defence, depending upon the absence of actual malice. If *fairly* warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society, and the law has not restricted the right to make them within any narrow limits" (l). Thus, an action cannot be maintained against a master for a character which he has fairly and honestly given of his servant to those who made inquiries of him; but if it be proved that he maliciously gave a bad character when the servant deserved a good one, he will be liable to an action (m). He may also warn his other servants not to associate with a servant whom he has dismissed on suspicion of dishonesty (n). And where a railway company, which had dismissed a guard for gross neglect of duty, published his name in a monthly circular addressed to their servants, stating therein the fact of his dismissal, and the ground of such dismissal, it was held that such publication was privileged (o).

Statements made without malice and in the honest belief of their truth by a member of a Board of Guardians at a meeting of the Board, concerning their clerk, in a discussion as to his accounts, are privileged, notwithstanding the fact that reporters, in accordance with the Board's usual custom, are allowed to be present (p). And where a borough head constable, in pursuance of the directions of the magistrates, given to facilitate business at the annual licensing meeting, issued to all persons having business at the meeting

(l) See also *Harrison v. Bush*, 5 E. & B. 344; *Stuart v. Bell* (1891), 2 Q. B. 341.

(m) *Child v. Affleck*, 9 B. & C. 403; *Fountain v. Boodle*, 3 Q. B. 5.

(n) *Somerville v. Hawkins*, 10 C. B. 583.

(o) *Hunt v. Great Northern Railway Company* (1891), 2 Q. B. 189.

(p) *Pittard v. Oliver* (1891), 1 Q. B. 474.

a copy of his report made to the magistrates, stating his grounds of objection to the renewal of licences, it was held that the publication of the report in this way was on a privileged occasion (*q*).

Again, a communication fairly and honestly made in protection of one's own interests will be privileged; so a man who believed that his debtor had committed an act of bankruptcy and left his place, was held justified in giving auctioneers who were about to sell his debtor's goods notice of such act of bankruptcy (*r*). And if the communication when made by him would be privileged, so would it be if made by his solicitor acting for him in the matter (*s*). A tenant of a house may complain to the landlord of the conduct of a workman whom the landlord has sent to do repairs (*t*).

So, too, communications may be privileged from the confidential relationship existing between two persons. Thus, a lady may be warned by a near relation of the character of her suitor (*u*); and a report sent by the directors of a company to the shareholders, which contains a statement by the auditors that the accounts have been badly kept by the secretary, is *primâ facie* privileged (*x*).

Further, a man who has suffered a grievance at the hands of a public official may complain to the proper authorities (*y*).

To support a defence of privilege it must be shewn that the person to whom a defamatory statement is published had an interest or duty in the matter with

(*q*) *Andrews v. Nott Bower* (1895), 1 Q. B. 888.

(*r*) *Blackham v. Pugh*, 2 C. B. 611.

(*s*) *Baker v. Carrick* (1894), 1 Q. B. 838. See as to publication by solicitor, *ante*, p. 169.

(*t*) *Toogood v. Spurring*, 1 C. M. & R. 181.

(*u*) *Todd v. Hawkins*, 2 M. & Rob. 20.

(*x*) *Lawless v. Anglo-Egyptian Cotton and Oil Company*, L. R. 4 Q. B. 262.

(*y*) See *Harrison v. Bush*, 5 E. & B. 344; *Woodward v. Lander*, 6 C. & P. 548.

CHAP. VIII. which the statement deals: it will not be sufficient that the author of the statement reasonably believed in the existence of such interest or duty. Thus, a ratepayer who writes to a Board of Guardians that A. secured his election as guardian by treating or other improper means cannot set up privilege because the guardians are not the persons to take action in the matter (z). Again, if A. writes a letter which he intends to send to B., and which would be privileged if so sent, but by mistake he puts it into an envelope directed to C., who is not interested in its subject-matter, and who reads it, A. cannot, it seems, successfully set up privilege (a).

Publication of
judicial pro-
ceedings.

The publication without malice of an accurate report of what has been said or done in a judicial proceeding in a court of justice is a privileged publication, although what was said or done would, but for the privilege, be libellous against an individual and actionable at his suit, and this is true although what is published purports to be, and is, a report not of the whole judicial proceeding, but only of a separate part of it, if the report of that part is an accurate report thereof and published without malice (b). So, too, the publication without malice of an accurate report of a judicial proceeding, which is *ex parte* and preliminary only (e.g., an application to magistrates for the issue of a summons for perjury), but which is held in open court, is privileged (c). With regard to a libel published in a newspaper, a recent Act specially enacts that a fair and accurate report in a newspaper of proceedings publicly heard before any Court exercising

(z) *Hebditch v. MacIlwaine* (1894), 2 Q. B. 54, disapproving the dictum of Fitzgerald, B., in the Irish case of *Waring v. McCaldin*, Ir. Rep. 7 C. L. 282.

(a) *Hebditch v. MacIlwaine*, *supra*, disapproving *Tompson v. Dashwood*, 11 Q. B. D. 43.

(b) *Macdougall v. Knight*, 25 Q. B. D. 1, at p. 7, where certain dicta of the H. of L. in the previous case of the same name (14 App. Cas. 194), which see, are discussed.

(c) *Kimber v. Press Association* (1893), 1 Q. B. 65.

judicial authority shall, if published contemporaneously with such proceedings, be privileged (*d*). CHAP. VIII.

In the case of a criticism on a published book or play there is no privilege, so that the author in bringing an action for libel has not to prove actual malice. The question in such a case will be, Does the criticism overstep the limits of fair comment? (*e*). Criticism on books or plays.

When the judge has decided that the occasion was privileged, the onus, as has been seen, will be on the plaintiff to shew that the defendant was actuated by malice, or did not honestly believe in the truth of the statement which he made. If the defendant did so believe in it, it will be immaterial that he had not reasonable grounds for such belief (*f*).

Injunction to restrain Publication of Libel.—The Court has jurisdiction to restrain by an injunction, even by an interlocutory one, the publication of a libel. But an interlocutory injunction ought only to be granted in the clearest cases, “where any jury would say that the matter complained of was libellous, and where, if the jury did not so find, the Court would set aside the verdict as unreasonable” (*g*). The jurisdiction is not confined to libels affecting a man’s trade or business (*h*).

(*d*) 51 & 52 Vict. c. 64, s. 3; see also 44 & 45 Vict. c. 60.

(*e*) *McRivale v. Carson*, 20 Q. B. D. 275.

(*f*) *Clark v. Molyneux*, 3 Q. B. D. 237; see *ante*, p. 177.

(*g*) *Bonnard v. Perryman* (1891), 2 Ch. 269; *Collard v. Marshall* (1892), 1 Ch. 571; see also *Trollope v. London Building Trades Federation*, 72 L. T. 342. Lord Halsbury in *Monson v. Tussauds* (1894), 1 Q. B. 671, did not agree that this was an absolute rule limiting the jurisdiction of the Court to grant an injunction. As to restraining slander see *Hermann Loog v. Bean*, 26 Ch. D. 306.

(*h*) *Monson v. Tussauds*, *ubi supra*.

CHAPTER IX.

WHO MAY COMMIT TORTS AND TORTS BY AGENTS.

CHAP. IX.Liability of
husband for
wife's torts.

Married Women.—At common law a husband was liable for his wife's torts, whether committed before or after marriage (*a*); and in Bacon's Abridgement of the Law (*b*) we find that "the husband is by law answerable for all actions for which his wife stood attached at the time of the coverture, and also for all her torts and trespasses during coverture, in which cases the action must be against them both; for if she alone were sued, it might be the means of making the husband's property liable without giving him an opportunity of defending himself." Jessel, M.R., also says in *Wainford v. Heyl* (*c*) (decided in 1875): "Strictly speaking, a married woman cannot commit torts; they are torts of her husband, and therefore she creates as against her husband a liability." Whether this dictum of that very learned judge may not be a little too wide it is unnecessary to discuss. Possibly all that was meant by it was that the husband was the person ultimately responsible for the torts committed by the wife. Thus, for example, in an older case—*The Liverpool Adelphi Loan Association v. Fairhurst* (*d*), (decided in 1854)—Pollock, C.B., said: "A *feme covert* is undoubtedly responsible for all torts committed by her during coverture, and the husband must be joined as a defendant. They are liable, therefore, for frauds committed by her on any

(*a*) Chitty, Pleadings, 7th ed. vol. i. p. 104.

(*b*) Baron and Feme, tit. (L).

(*c*) L. R. 20 Eq. 321.

(*d*) 9 Ex. 422; see also *Capel v. Powell*, 17 C. B. N. S. 743, *per* Erle, C.J.

person as for any other personal wrongs." But, as is there shewn, there was no liability if the fraud was directly connected with a breach of contract by the wife, *e.g.*, where the wife contracting with a third person represented to him that she was unmarried. The wife, however, became solely responsible for her torts where the husband had abjured the realm, or was banished (*e*); and so, too, where the parties were divorced or judicially separated under 20 & 21 Vict. c. 85, s. 26, or where the wife obtained a protection order under s. 21 of that Act. And it has been held that, where a dissolution of marriage has taken place, the husband cannot be joined in an action for a tort committed by the wife during the marriage (*f*). Where a tort was committed by a husband and wife jointly, both were sued (*g*).

The husband being, then, liable at common law for his wife's torts committed before or after marriage, let us see how recent legislation affects his position. The Married Women's Property Act, 1870, did not touch this question, though it did enact (s. 12) that a husband married after the passing of the Act (August 9, 1870), should not be liable for his wife's ante-nuptial debts. Then came the Amending Act of 1874 (37 & 38 Vict. c. 50), which repealed that provision as to husbands married after the passing of that Act, and enacted that husbands and wives married after the passing of that Act might be jointly sued for such debts. It also enacted by s. 2, that, in an action for the wife's ante-nuptial debts, or for damages for torts committed by her before marriage, or for breaches of contracts made by her before marriage, the husband should be liable for the debts or damages to the extent of certain assets, which may be roughly described as property brought to him by his wife.

The Married Women's Property Acts, 1870, 1874.

(*e*) Bacon's Abridgement: Baron and Feme, tit. (M).

(*f*) *Capel v. Powell*, 17 C. B. N. S. 743.

(*g*) *Vine v. Saunders*, 4 Bing. N. C. 96.

CHAP. IX.

Married
Women's Pro-
perty Act,
1882.

Rights and
liabilities of
married
women.

We now come to the Act of 1882, which by s. 22 repeals the two preceding Acts, with the proviso that such repeal is not to affect any act done or right acquired while either of such Acts was in force, or the rights and liabilities of any husband or wife, married before the commencement of this last Act, to sue or be sued under the provisions of the repealed Acts in respect of debts, contracts, or torts in respect of which any such right or liability shall have accrued to or against such husband or wife before the commencement of this Act. By s. 1, sub-s. 2, of the Act of 1882, it is enacted that "a married woman shall be capable of entering into, and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract, or in tort, or otherwise, in all respects as if she were a *feme sole*, and her husband 'need not' be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding, brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property (*h*); and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise" (*i*).

S. 12 gives to every married woman the same civil and criminal remedies against all persons, including her husband, "for the protection and security of her own separate property," as if such property belonged to her as a *feme sole*, but with this exception she cannot sue her husband for a tort. The section does not empower him to sue her (*k*).

(*h*) This is so, whether she sues alone or jointly with her husband: *Beasley v. Roney* (1891), 1 Q. B. 509.

(*i*) By the M. W. P. Act, 1893, the Court may in any action or proceeding instituted by a married woman order payment of the opposite party's costs out of property which is subject to a restraint on anticipation.

(*k*) She cannot prosecute her husband for a personal libel: *Reg. v. Mayor of London*, 16 Q. B. D. 772. And it would appear that, if divorced, she cannot sue her husband for a personal tort committed

CHAP. IX.Ante-nuptial
torts.

Let us now look at s. 13, which deals (*inter alia*) with the wife's *ante-nuptial* torts. That section enacts that "a woman after her marriage shall continue to be liable in respect of, and to the extent of, her separate property, for all debts contracted and all contracts entered into or wrongs committed by her before her marriage, including any sums for which she may be liable as a contributory, either before or after she has been placed on the list of contributories, under and by virtue of the Acts relating to joint-stock companies; and she may be sued for any such debt and for any liability in damages or otherwise under any such contract or in respect of any such wrong; and all sums recovered against her in respect thereof, or for any costs relating thereto, shall be payable out of her separate property; and as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be deemed to be primarily liable for all such debts, contracts, or wrongs, and for all damages and costs recovered in respect thereof: provided always that nothing in this Act shall operate to increase or diminish the liability of any woman, married before the commencement of this Act for any such debt, contract or wrong as aforesaid, except as to any separate property to which she may become entitled by virtue of this Act, and to which she would not have been entitled for her separate use under the Acts hereby repealed, or otherwise, if this Act had not passed."

The 14th section deals with the liability of a husband for the ante-nuptial debts, contracts, or torts of the wife, enacting that "a husband shall be liable for the debts of his wife contracted, and for all contracts entered into and wrongs committed by her,

Husband
liable for
ante-nuptial
debts, con-
tracts, or torts
of wife to a
certain extent.

during coverture: *Phillips v. Barnett*, 1 Q. B. D. 436. If a husband has a right to enter a house, the separate property of his wife, against her will, which is not clear, he cannot delegate this right, and a third person, who by the authority of the husband enters the house, may be sued in trespass by her: *Weldon v. De Bathe*, 14 Q. B. D. 339.

CHAP. IX. before marriage, including any liabilities to which she may be so subject under the Acts relating to joint-stock companies as aforesaid, to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been *bonâ fide* recovered against him in any proceeding at law in respect of any such debts, contracts, or wrongs for or in respect of which his wife was liable before her marriage as aforesaid; but he shall not be liable for the same any further or otherwise; and any Court in which a husband shall be sued for any such debt [*sic*] shall have power to direct any inquiry or proceeding which it may think proper for the purpose of ascertaining the nature, amount, or value of such property: provided always that nothing in this Act contained shall operate to increase or diminish the liability of any husband, married before the commencement of this Act, for or in respect of any such debt or other liability of his wife as aforesaid."

Procedure.

The procedure in actions for these ante-nuptial liabilities of the wife is prescribed by s. 15. "A husband and wife may be jointly sued in respect of any such debt or other liability (whether by contract or for any wrong) contracted or incurred by the wife before marriage as aforesaid, if the plaintiff in the action shall seek to establish his claim, either wholly or in part, against both of them; and if in any such action, or in any action brought in respect of any such debt or liability against the husband alone, it is not found that the husband is liable in respect of any property of the wife so acquired by him, or to which he shall have become so entitled as aforesaid, he shall have judgment for his costs of defence, whatever may be the result of the action against the wife if jointly sued with him; and in any such action against hus-

band and wife jointly, if it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband personally, and against the wife as to her separate property; and as to the residue, if any, of such debt and damages, the judgment shall be a separate judgment against the wife as to her separate property only."

The effect, then, of sections 13, 14, and 15, of the Act of 1882 is, that where a marriage has taken place on or after the commencement of the Act—that is, on or after January 1, 1883—the wife is liable for her *antenuptial* debts, contracts, or torts, and may be sued for them, and all sums recovered against her are to be paid out of her separate property; the husband is also liable for them, but not beyond the amount of the property which he has acquired or become entitled to from or through his wife; and in actions for these antenuptial debts, contracts, or torts of the wife, the husband may be sued jointly with the wife or alone; if it is not found that the husband is liable, he may have judgment for his costs; if it is found that he is liable for the amount recovered, or part thereof, and he is sued jointly with the wife, the judgment, to the extent of the amount for which he is liable, shall be a joint one against the husband personally, and against the wife as to her separate property, there being a separate judgment for any further amount recovered against the wife as to her separate estate.

Effect of the
Married
Women's
Property Act,
1882.

With regard to torts committed by or against a wife *during* marriage, s. 1, sub-s. 2, of the Act of 1882, as we have seen, shews that she may be sued or sue in respect of them as a *feme sole*; that her husband *need not* be joined with her as plaintiff or defendant; and that any damages or costs recovered against her in such actions are payable out of her separate estate, and not otherwise. This sub-section,

CHAP. IX. however, does not do away with the common law liability of a husband for the torts of his wife committed during marriage, but merely enables a person to sue the wife alone if he chooses to do so (*l*).

Infants.—As a general rule, infants are liable for torts (*m*): thus, an action can be maintained against an infant for a slander (*n*); or for wrongfully detaining another's goods which have improperly come into his possession (*o*); or for money embezzled (*p*), where the action, though in form an action *ex contractu*, was held to be in substance one *ex delicto*. But if an action, though framed in tort, is really founded on contract, it cannot succeed against an infant. Therefore, where an infant hired a horse for a ride, and injured it by immoderate riding, an action for the injury caused by such immoderate riding was held not to lie, Lord Kenyon saying: "If it were in the power of a plaintiff to convert that which arises out of a contract into a tort, there would be an end of that protection which the law affords to infants" (*q*). If, however, the wrongful act is outside the object and purpose of the contract, or forbidden by it, an action may be brought for it. Thus, where an infant, a Cambridge undergraduate, hired a mare for riding, for seven shillings, and was told that she was not fit for jumping (the charge for an animal so fit being one guinea), and the infant lent the mare to a friend, who, in trying to force the mare over a fence, transfixed her to a stake and killed her, it was held that the infant was liable, and that he had committed a trespass just as much as if he had gone into a field and taken out the mare and killed her (*r*).

(*l*) *Seroka v. Kattenberg*, 17 Q. B. D. 177.

(*m*) See Bacon's Abridgement: Infant (H.).

(*n*) *Defries v. Davis*, 1 Bing. N. C. 692.

(*o*) *Mills v. Graham*, 1 B. & P. N. R. 140.

(*p*) *Bristow v. Eastman*, 1 Esp. 172.

(*q*) *Jennings v. Rundall*, 8 T. R. 335.

(*r*) *Burnard v. Haggis*, 14 C. B. N. S. 45.

Again, where a contract is induced by the false representations of an infant, an action of deceit will not lie against him. Therefore, where A. was induced to exchange mares with B. (an infant) by B.'s falsely and fraudulently warranting his mare to be sound, whereas it was not sound, an action by A. against B. for deceit failed on demurrer to the declaration, the Court saying that, where the substantial ground of action rests on promises, the plaintiff cannot, by changing the form of action, render a person liable who would not have been liable on his promise (s).

Master and Servant.—Upon the principle that “qui facit per alium facit per se,” the master is responsible for the acts of his servants; and that person is undoubtedly liable who stood in the relation of master to the wrongdoer—he who selected him as his servant, from the knowledge of or belief in his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey; and whether such servant has been appointed by the master directly, or intermediately through the intervention of an agent authorised by him to appoint servants for him, can make no difference (t).

Common law
liability of
master for
torts of
servant

If we want a reason for a rule so obviously founded on principles of justice, we may find one in the remarks of Lord Cranworth in *Bartonshill Coal Company v. Reid* (u), where he says: “Where an injury is occasioned to any one by the negligence of another, if the person injured seeks to charge with its consequences any person other than him who actually caused the damage, it lies on the person injured to shew that the circumstances were such as to make some other person responsible. In general, it is sufficient for this purpose to shew that the person whose neglect caused

(s) *Green v. Greenbank*, 2 Mar. 485.

(t) *Quarman v. Burnett*, 6 M. & W. 499. As to appointment of “agent of necessity” see *Gwilliam v. Twist* (1895), 2 Q. B. 84.

(u) 3 Macq. H. of L. Cas. 266, at p. 282.

CHAP. IX. the injury was, at the time when it was occasioned, acting, not on his own account, but in the course of his employment as a servant in the business of a master, and that the damage resulted from the servant so employed not having conducted his master's business with due care. In such a case the maxim 'Respondeat superior' prevails, and the master is responsible.

"Thus, if a servant, driving his master's carriage along the highway, carelessly runs over a bystander, or if a gamekeeper, employed to kill game, carelessly fires at a hare so as to shoot a person passing on the ground, or if a workman, employed by a builder in building a house, negligently throws a stone or brick from a scaffold and so hurts a passer-by—in all these cases (and instances might be multiplied indefinitely), the person injured has a right to treat the wrongful or careless act as the act of the master. If the master himself had driven his carriage improperly, or fired carelessly, or negligently thrown the stone or brick, he would have been directly responsible, and the law does not permit him to escape liability because the act complained of was not done with his own hand. He is considered as bound to guarantee third persons against all hurt arising from the carelessness of himself or of those acting under his orders in the course of his business."

"But the liability by virtue of the principle of the relation of master and servant must cease where the relation itself ceases to exist; and no other person than the master of such servant can be liable, on the simple ground that the servant is the servant of another, and his act the act of another; consequently, a third person entering into a contract with the master, which does not raise the relation of master and servant at all, is not thereby rendered liable." This is well shewn by the old case of *Quarman v. Burnett* (x).

(x) 6 M. & W. 499.

There the owners of a carriage were in the habit of hiring horses from the same person to draw it for a day or drive, and the owner of the horses provided a driver, through whose negligence an injury was done to a third party, and it was held that the owners of the carriage were not liable for such injury. It was also held that it made no difference that the owners of the carriage had always been driven by the same driver, or that they had always paid him a fixed sum for each drive, or that they had provided him with a livery which he left at their house at the end of each drive, and that the injury in question was occasioned by his leaving the horses whilst so depositing the livery in their house. But if in a case of this kind the person who has entered into the arrangement with the livery-stable keeper were to assent to the wrongful act of the driver whereby the injury was done, or give encouragement to its being done, and thus become *dominus pro tempore*, he would be liable for its consequences (y). The authority of these cases has been recognized in *Jones v. Mayor of Liverpool* (z), where it was held that a corporation owning water-carts drawn by horses belonging to a contractor, in whose employment the drivers also were, was not liable for an injury caused to a person by the negligence of one of the drivers.

No man can serve two masters, but a man may be in the permanent employment of one person and yet for a particular job be to all intents and purposes the servant of another, so as to render that other liable for his wrongful acts. Thus, in *Murray v. Currie* (a) the defendant, who was the owner of a ship, employed a stevedore to unload his vessel. The stevedore employed his own labourers, amongst whom was the plaintiff, and also one of the defendant's crew named Davis, whom he paid, and over whom he had entire

(y) *M'Laughlin v. Pryor*, 4 M. & G. 48.

(z) 14 Q. B. D. 890. See *Donovan v. Laing* (1893), 1 Q. B. 629, 633.

(a) L. R. 6 C. P. 24. Cf. now p. 237, *post*.

CHAP. IX. control, to assist them in unloading. The plaintiff, whilst engaged in the work, was injured by the negligence of Davis, and thereupon brought an action against the defendant. The defendant was not liable, as Davis was, for the time, doing the work of an independent contractor—the stevedore—and altogether under his control. Brett, J., said: “I apprehend it to be a true principle of law that if I lend my servant to a contractor, who is to have the sole control and superintendence of the work contracted for, the independent contractor is alone liable for any wrongful act done by the servant whilst so employed. The servant is doing, not my work, but the work of the independent contractor” (b). It is well also to bear in mind that, in ascertaining who is liable for the act of a wrongdoer, one must look to the wrongdoer himself, or to the first person in the ascending line, who is the employer, and has control over the work (c). The payment of wages will not decide whose servant the wrongdoer is. Thus, a colliery company, having begun sinking a shaft in their colliery, for which purpose they had fixed an engine near the mouth of the shaft, agreed with one Whittle for the sinking and excavating at a certain price per yard, Whittle to find all the labour, and the company to provide and place at the disposal of Whittle the necessary engine-power, ropes, and hoppets, with an engineer (who was employed and paid by the company), to work the engine, the engine and engineer to be under the control of Whittle. The plaintiff, who was one of the men employed and paid by Whittle, whilst working at the bottom of the shaft, was injured by the negligence of the engineer. In an action by the plaintiff against the company, it was held that, though the engineer remained the general servant of the company, and

(b) The defendant no doubt would have been liable if he had retained control over Davis: *Union Steamship Company v. Claridge* (1894), App. Cas. 185.

(c) See per Willes, J., L. R. 6 C. P. at p. 27.

was paid by them, yet, as he was under the orders and control of Whittle at the time the injury was inflicted, he was acting as the servant of Whittle and not of the company, and so the company were not liable (*d*). If, however, the agreement had been that whereas Whittle was to sink the shaft, and get away the soil, and do all the necessary work to make a proper shaft, yet that incidentally to this work the defendants had undertaken to do part of it themselves by means of their machinery and servants—so that this part of the work would have been carried on independently of Whittle, and not under his control—the defendants would have been liable (*d*).

In a later case the defendants contracted to lend a crane with a man in charge of it to a firm engaged in loading a ship. The man in charge of the crane received orders from the firm or their servants as to the working of the crane and the defendants had no control in the matter. Owing to the negligence of this man the plaintiff, a servant of the firm, was struck and injured. It was held that, though the man in charge remained the general servant of the defendants, yet as they had parted with the power of controlling him in the working of the crane they were not liable for the consequences of his negligence. It was further held that it is immaterial in such a case whether a servant has been lent for a consideration or gratuitously (*e*). If the case had been that owing to the neglect of the man in charge the crane had been allowed to get out of order, and thereby the plaintiff was injured, the defendants might have been liable (*e*).

The above cases will probably be sufficient to enable one to determine—provided, of course, that the true facts are known—whether or not the relation of

(*d*) *Rourke v. White Moss Colliery Company*, 2 C. P. D. 205.

(*e*) *Donovan v. Laing* (1893), 1 Q. B. 629.

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master and servant exists between a man, who has injured another by a wrongful or negligent act, and a person whom it is proposed to sue for the injuries sustained by reason of that act.

How liability
of master for
torts of
servant is
determined.

At the same time it is clear that a master is not responsible for every act of his servant, and, in determining his responsibility, the main point to be kept in view is whether the act done was done in the course of the servant's employment (*f*). Take the case, for instance, of a coachman. If a servant, driving a carriage, in order to effect some purpose of his own, wantonly strike the horses of another person and cause an accident, the master will not be liable. But if, in order to perform his master's orders, he strikes, but injudiciously, and in order to extricate himself from a difficulty, that will be negligent and careless conduct for which the master will be liable, being an act done in pursuance of the servant's employment (*g*). The master may be responsible for such an act though he has expressly forbidden the servant to do it. In *Limpus v. The London General Omnibus Company* (*h*) the plaintiff sued the defendants for damage caused to his omnibus by the defendants' driver obstructing the plaintiff's driver as he was attempting to pass him on the road (a species of annoyance known in London as "nursing"), and thereby upsetting and damaging the plaintiff's omnibus. There was no doubt that the defendants' driver was acting contrary to orders, as one of the regulations of the company, to which he was bound to conform, directed him to drive his horses at a steady pace, endeavouring as nearly as possible to work in conformity with the time-list, and not on any account to race with or obstruct any other omnibus, or hinder or annoy the driver or conductor thereof in

(*f*) See *Storey v. Ashton*, L. R. 4 Q. B. 476; see and *cf. Coupe Company v. Maddick* (1891), 2 Q. B. 413, *ante*, p. 93.

(*g*) *Croft v. Alison*, 4 B. & Al. 590.

(*h*) 1 H. & C. 526.

his business, whether that omnibus were one belonging to the company or otherwise. The learned judge in substance told the jury that if the defendants' driver acted carelessly, recklessly, wantonly, and improperly, but in the course of his service and employment, and in doing that which he believed to be for the interests of the defendants, the defendants would be responsible for his acts, and that the instructions given to the driver were immaterial; but that, if the true character of the driver's act was that it was an act of his own, and done to effect a purpose of his own, the defendants were not responsible. The jury returned a verdict for the plaintiff, and the Court held that the direction of the learned judge was right. If a master were to be absolved from liability merely because he has told his servant not to do a particular act, he might equally absolve himself from liability for acts of the servant, though done in the course of his employment, by telling him never to break the law.

In judging whether an act is in the course of the servant's employment, one must consider what the nature of the employment is. In the case just mentioned, the scope of the driver's employment was not merely to drive the omnibus from terminus to terminus but to use it in every way that would be right and proper, exercising his discretion for the picking up of traffic and the forwarding of his masters' interests. Of course, every act supposed to be done by a servant for the interests of the master is not necessarily done in the course of his employment. A footman might think, and think rightly, that it was for the interest of his master that he should get on the box and drive the carriage, but no one would say that to do so was in the scope of the footman's employment, and that the master was responsible for the wilful act of the footman in taking charge of the horses.

What has been said up to this may, perhaps, be summed up in these words:—A master is responsible

CHAP. IX. for the act of his servant, even if it be wilful, reckless, or improper, provided that the act is the act of the servant done within the scope of his employment, and in executing the matter for which he was engaged at the time; but if the true character of the act of the servant be that it was an act of his own, and done in order to effect a purpose of his own, the master is not liable for it.

So far, the rule seems clear enough. But in its application the Courts have drawn distinctions of so fine a character that there are many cases which at first sight it may seem difficult to bring within it. No doubt the difficulties in these cases arise to a great extent from this, that it is a question of fact whether a servant, when he did the tortious act complained of, was acting within the scope of his employment and in the execution of his master's business, or whether the act was an act of his own, and done in order to effect a purpose of his own. Let us take a few of the best known of these in order of date. In *Joel v. Morison* (i) the action was brought for injuries sustained by the plaintiff, who was knocked down in Bishopsgate Street, in the City of London, by the defendant's cart. The defence set up was, that at the time of the accident and for some time before and after it the cart was driven between Burton Crescent and Finchley, and did not go into the City at all. Parke, B., in summing up the case, said: "If the servants, being on their master's business, took a detour to call upon a friend, the master will be responsible. If you think the servants lent the cart to a person who was driving without the defendant's knowledge, he will not be responsible. Or if you think that the young man who was driving took the cart surreptitiously, and was not at the time employed on his master's business, the defendant will not be liable. The master is only liable where the servant is acting in the course of his employment.

(i) 6 C. & P. 501 (1834).

If he was going out of his way against his master's implied commands, when driving on his master's business, he will make his master liable; but if he was going on a frolic of his own, without being at all on his master's business, the master will not be liable."

In *Whatman v. Pearson* (k) the defendant, a contractor under a district board, was engaged in constructing a sewer, and employed men with horses and carts. The men so employed were allowed an hour for dinner, but were not permitted to go home to dine or to leave their horses and carts. One of the men, contrary to his instructions, went home to dinner at a place about a quarter of a mile out of the line of his work, and left his horse unattended in the street before his house. Whilst the driver was absent at his dinner, the horse ran away, and damaged certain railings belonging to the plaintiff. The jury having found that the driver was at the time acting in the course of his employment, it was held by the Court that they were justified in so finding, as it was clearly within the general scope of his authority to conduct the horse and cart during the day.

In the next case, *Storey v. Ashton* (l), the master escaped liability for his servant's negligence. There the defendant, a wine-merchant, sent his carman and clerk with a horse and cart to deliver some wine and bring back some empty bottles. On their return, when about a quarter of a mile from the defendant's offices, the carman, instead of performing his duty, which was to drive to the defendant's offices, deposit the bottles, and take the horse and cart to stables in the neighbourhood, was induced by the clerk (it being after business hours) to drive in quite another direction on business of the clerk's, and while they were thus driving the plaintiff was run over by the negligence of the carman. On these facts it was held that the

(k) L. R. 3 C. P. 422 (1868).

(l) L. R. 4 Q. B. 476 (1869).

CHAP. IX.

defendant was not liable, for that the carman was not doing the act, in doing which he had been guilty of negligence, in the course of his employment as servant. "His employment was to deliver the wine and carry the empty bottles home; and if he had been merely going a roundabout way home the master would have been liable; but he had started on an entirely new journey, on his own or his fellow-servant's account, and could not in any way be said to be carrying out his master's employment."

The latest case which need be mentioned shews that if a servant take out his master's horse and cart without the knowledge or permission of his master, and not upon his master's business, but for some other purpose, the mere fact that he subsequently does something in the course of his usual employment—*e.g.*, by collecting a few empty casks for his master on his return homewards—will not convert the journey undertaken for purposes outside his employment into a journey made in the ordinary course of his employment, so as to render his master responsible for his negligence (*m*).

Liability of master where he leaves servants discretion to do or not to do certain acts.

We now come to consider a different branch of this subject—namely, how far the master is liable for the acts of a servant whom he authorises to do acts of a certain class, and to whom he necessarily leaves a certain *discretion* as to the time when, and the manner in which, any such act is to be done. In most of the cases upon this subject the actions have been brought against railway companies, but of course the statement of the law laid down as regards them will be applicable to ordinary cases of master and servant. The general rule is laid down by Blackburn, J., in *Poulton v. London and South-Western Railway Company* (*n*): "There can be no question, since the

(*m*) *Rayner v. Mitchell*, 2 C. P. D. 357 (1877).

(*n*) L. R. 2 Q. B. 534.

decision of the case of *Goff v. Great Northern Railway Company* (o), that where a railway company or any other body (for it does not matter whether it is a railway company or not) have upon the spot a person acting as their agent, that is evidence to go to the jury that that person has authority from them to do all those things on their behalf which are right and proper in the exigencies of their business—all such things as somebody must make up his mind on behalf of the company whether they should be done or not; and the fact that the company are absent, and the person is there to manage their affairs, is *prima facie* evidence that he was clothed with authority to do all that was right and proper; and if he happens to make a mistake or commits an excess whilst acting within the scope of his authority, his employers are responsible for it.”

What is the scope of his authority is, of course, a question of fact (p). But it is essential to bear in mind that, though a servant may, whilst acting in the performance of the general duty cast upon him, neglect the particular direction as to the mode of doing it, and in so doing commit a tortious act, he will none the less be acting within the scope of his employment (q); and this may be so though the act be a criminal act (r).

In *Bayley's case*, just referred to, the plaintiff, who was travelling to Macclesfield by the defendants' railway, was injured by being violently pulled out of a carriage, just after the train had started, by one of the defendants' porters, who thought, but erroneously as it turned out, that the plaintiff was in the wrong train. The defendants' rules directed their porters not to suffer passengers to get into or out of trains in motion,

(o) 3 E. & E. 672.

(p) *Bank of New South Wales v. Owen*, 4 App. Cas. 270.

(q) See per Kelly, C.B., in *Bayley v. Manchester, Sheffield, and Lincolnshire Railway Company*, L. R. 8 C. P. 148, at p. 153.

(r) *Dyer v. Munday* (1895), 1 Q. B. 742, ante, p. 36.

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and to do all in their power to promote the comfort of the passengers and the interests of the company. It was also proved to be the duty of the porters to prevent passengers from going by the wrong trains as far as they could do so, but they were forbidden to remove passengers from such wrong trains. The defendants were held liable for the injuries sustained by the plaintiff, on the ground that the porter was acting within the scope of his authority, however much he abused such authority, and however improperly and blunderingly he acted.

If, however, the servant or agent clothed with such authority as we have just mentioned does some tortious act which is outside the scope of that authority, or which the master or principal would have had no power to do himself, and has not specially authorised, the master or principal will not be answerable for it(s).

Let us now illustrate these rules by a few cases, taking those first in which the master has been held responsible for the servant's act.

Cases in which master is held liable for torts of servant.

In *Scymour v. Greenwood (t)*, the conductor of an omnibus removed from the omnibus a passenger whom he considered to be drunken, and used such unnecessary violence in doing so that the passenger was seriously injured. It was held that his master, by giving him authority to remove an offending passenger, necessarily gave him also authority to judge for himself who should be considered an offending passenger; so that, even if he came to a wrong conclusion as to the conduct of the passenger, his master would be answerable.

Again, take the case of an arrest of a supposed offender by an officer of a railway company. If a passenger having failed to produce, or, if requested, to

(s) *Poulton v. London and South-Western Railway Company*, L. R. 2 Q. B. 534.

(t) 6 H. & N. 359; 7 H. & N. 355.

deliver up, a ticket shewing that his fare is paid, or to pay his fare, refuses, on request by an officer or servant of the company, to give his name and address, he may be detained by an officer of the company or a constable till he can be brought before a justice (*u*). In the ordinary course of affairs the company must decide whether they will submit to what they believe to be an imposition, or use this summary power for their protection: and as, from the nature of the case, the decision whether a particular passenger shall be arrested or not must be made without delay, and as the case may not be of unfrequent occurrence, it is a reasonable inference that, in the conduct of their business, the company have on the spot officers with authority to determine, without the delay attending on convening the directors, whether the servants of the company shall or shall not on the company's behalf apprehend a person accused of this offence (*x*). So where (before the repeal of the somewhat similar provisions of s. 103 of 8 & 9 Vict. c. 20), a police-inspector in the employment of a railway company ordered the apprehension of a passenger whom he erroneously supposed to have travelled without having paid his fare, with intent to avoid payment thereof, the company were held liable (*x*).

Again, in *Moore v. Metropolitan Railway Company* (*y*), the plaintiff, who had been wrongly arrested by the defendants' inspector, under s. 104 of the Act just referred to (8 & 9 Vict. c. 20), for a supposed offence under the now repealed s. 103, succeeded in an action against the company for false imprisonment, on the ground that the arrest was within the scope of the

(*u*) See 52 & 53 Vict. c. 57, s. 5, replacing repealed provisions of 8 & 9 Vict. c. 20, s. 103.

(*x*) *Goff v. Great Northern Railway Company*, 30 L. J. Q. B. 148, a decision under 8 & 9 Vict. c. 20, s. 103, the bulk of which was repealed in 1892. See now 52 & 53 Vict. c. 57, s. 5, *supra*. As to Tramways, see 33 & 34 Vict. c. 78, ss. 51, 52, and 56; *Rayson v. South London Tramways Company* (1893), 2 Q. B. 304.

(*y*) L. R. 8 Q. B. 36.

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inspector's authority to promote the interests of the company and protect them from the fraud specified in s. 103, and that, if that fraud had been committed, the arrest would have been lawful (z).

In the latest case on the subject it was held that the manager of a restaurant has implied authority from his employers to give into custody persons who are acting in a riotous or disorderly way in the restaurant, and if he blunders in so doing his employers are liable (a).

Cases in which
master held
not liable for
torts of
servant.

Having now dealt with cases in which a master has been held liable for the acts of a servant who, authorised to do acts of a certain class, blunders or exceeds his authority whilst professing to do such acts, let us next mention a few cases in which the master has been held *not liable*, and see in what way they are to be distinguished from those we have dealt with.

Poulton v. London and South-Western Railway Company (b) will be found very instructive on this point. There the plaintiff, having taken a horse to an agricultural show by the defendants' railway, was entitled, under arrangements advertised by the defendants, to take the horse back free of charge on the production of a certificate. The plaintiff accordingly produced a certificate, and the horse was put into a box without payment or booking, and the plaintiff, having taken a ticket for himself, proceeded by the same train. At the end of the journey the station-master demanded payment for the carriage of the horse. This the plaintiff refused to pay, explaining the arrangements which the company had made. By the orders of the station-master he was then detained in custody by two policemen, until it was ascertained by telegraph that

(z) See note (y) on p. 201.

(a) *Ashton v. Spiers and Pond*, 9 T. L. R. 606; this, though the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 18, only provides for the expulsion of such persons.

(b) L. R. 2 Q. B. 534.

all was right. The plaintiff then brought an action against the company for false imprisonment, and the question arose, were the defendants liable? The Court held that they were not. But how is this case to be distinguished from those already mentioned—*e.g.*, from *Moore v. Metropolitan Railway Company*? (c) In both cases the officers professed to be acting and intended to act in the interest of their respective employers, and in neither case was any express authority given to do the act complained of. The distinction is this. In *Moore v. Metropolitan Railway Company* if the offence which the officer supposed to have been committed—namely, travelling without having previously paid the proper fare, with intent to avoid payment thereof—had been committed, the company would have had power to arrest, and therefore it was to be assumed that the officer had implied authority to arrest the plaintiff on their behalf (see 8 & 9 Vict. c. 20. ss. 103, 104; s. 103 is now in part repealed: pp. 201, 202, *ante*); but in *Poulton's case*, even supposing the plaintiff was not entitled to have his horse carried free, and had improperly got the defendants to carry him without having paid for his carriage, the defendants could not legally detain the plaintiff, though they might, under s. 97 of 8 & 9 Vict. c. 20, detain and sell the horse. It could not then be assumed that the station-master had any implied authority from the defendants to do an act which they had no authority to do themselves. Therefore the plaintiff's remedy, if any, was against the station-master, and not against the company.

Again, where a person does an act which is clearly outside the authority given him by his master, the master, though the act be done for his benefit, will not, in the absence of ratification, be liable for it.

Thus, it has been held that a foreman porter in the service of a railway company, who, in the absence of

(c) L. R. 8 Q. B. 36

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the station-master, is in charge of the station, has no implied authority to give in charge a person whom he suspects of stealing the company's property, and if he gives in charge an innocent person, the company are not liable (*d*). The *ratio decidendi* in this case is well set out by Brett, J. : "I will assume that Holmes (the foreman porter) was the person who had the control of the station-yard, so as to have the control of anything done there in the ordinary course of business ; but I think that this was not so done. It was pointed out by Blackburn, J., in *Poulton v. London and South-Western Railway Company* (*e*), that it is not enough that the act should be for the benefit of the master, but it must be in the ordinary course of business, in order that an authority to do it may be implied. In the case of a person being arrested for breaking the company's bye-laws, it may well be said that this is the way in which the company carry on their business, and similarly, if an officer be appointed expressly to watch the company's property. I should think, if he took an innocent person into custody on the charge of stealing, it might well be said that the company were liable ; but in this case the company had not, I think, authorised Holmes to protect their goods by giving into custody any one he thought right, and it was not their ordinary way of carrying on their business." Keating, J., also suggested that Holmes might have acted from a sense of the duty which rests on every one to give in charge a person who, he thinks, is committing a felony, and, if that were so, his conduct would in no way be connected with the defendants.

The case of *Allen v. London and South-Western Railway Company* (*f*) further illustrates the general proposition that, in considering whether an act is within the scope of a servant's authority so as to bind

(*d*) *Edwards v. London and North-Western Railway Company*, L. R. 5 C. P. 445.

(*e*) L. R. 2 Q. B. 534.

(*f*) L. R. 6 Q. B. 653.

his master, one must consider what exactly the servant's duties are. In that case a booking-clerk in the employment of the defendants, whose duties were to issue tickets to passengers, to receive the money for such tickets, and to keep it in a till under his charge, gave into custody a person whom he alleged to have attempted to rob the till. The charge of attempted robbery was dismissed, and thereupon the defendants were sued for assault and false imprisonment. The Court held that the defendants were not liable for the act of their clerk, for that such act was not done for the purpose of protecting the property placed in his charge, or of recovering it back, but was an act done for the purpose of *punishing* a supposed offender for something already done. There is no implied authority in a person having the custody of property to take such steps as he thinks fit to punish a person whom he supposes to have done something with reference to the property which he has not done. In such a case the act of punishing the offender is not anything done with reference to the property; it is done merely for the purpose of vindicating justice. But it seems tolerably clear that, if a person in charge of a till cannot prevent another from robbing it, otherwise than by giving him into custody, or if he has reason to believe that the money has been actually stolen, and that he can get it back by giving the thief into custody, and he does so give him into custody with that view, he will be held to have acted within his implied authority (*g*).

One more case, by way of illustration, may be cited on this subject. In *Bolingbroke v. The Local Board of Swindon (h)*, the defendants, who were in the occupation of a sewage farm, had given full power for the management of the farm in the most beneficial manner to one Buchan. A ditch ran between the farm and

(*g*) See per Blackburn, J., L. R. 6 Q. B. 65; see also *Abrahams v. Deakin* (1891), 1 Q. B. 516.

(*h*) L. R. 9 C. P. 575.

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CHAPTER X.

WHO MAY COMMIT TORTS AND TORTS BY
AGENTS—(*continued*).

Frauds by Servants or Agents.—The subject of CHAP. X.
fraud and deceit has been discussed in a previous chapter. Suffice it to say here, that as to the liability of a master or principal for the fraud of a servant or agent, the law may be regarded as settled by the judgment of the Court in *Barwick v. English Joint Stock Bank* (a), where it is said: “With respect to the question whether a principal is answerable for the act of his agent in the course of his master’s business, and for his master’s benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master’s benefit, though no express command or privity of the master be proved.” But where the wrongful act is done by an agent or servant, not for his principal or master, but for his own private ends, the principal or master is not liable (b).

Partners.—It follows from the principles of agency, coupled with the doctrine that each partner is the agent of the firm for the purpose of carrying on its business in the usual way, that a partnership is liable in damages for the torts of any one of its members in conducting the business of the partnership (c). So, too, as regards fraud—(1) Where one partner, acting

(a) L. R. 2 Ex. 259, at p. 265.

(b) *British Mutual Banking Company v. Charnwood Forest Railway Company*, 18 Q. B. D. 714; *Marsh v. Joseph* (1897), 1 Ch. 213.

(c) See *Lindley Partnership*, 6th ed., 159; P. A. 1890, s. 10.

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within the scope of his authority, as evidenced by the business of the firm, obtains money, and misapplies it, the firm is answerable for it. (2) Where the firm in the course of its business receives money belonging to other people, and one of the partners misapplies that money whilst it is in the custody of the firm, the firm must make it good. (3) But if a partner, in the course of some transaction unconnected with the business of the firm, obtains money and then misapplies it, the firm is not thereby, without more, liable to make good the loss (*d*).

Ratification of Torts.—A person not originally liable for a tort committed by his servant or agent may become liable by ratification of it. In *Wilson v. Tumman* (*c*), Tindal, C.J., says: “That an act done, *for another*, by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal if subsequently ratified by him, is the known and well-established rule of law. In that case, the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent as by, and with all the consequences which follow from, the same act done by his *previous* authority.” Two things, therefore, are necessary in order that a person may be liable for a tort by the doctrine of ratification—(1) The tortfeasor must at the time have assumed to act on his behalf; (2) He must have subsequently ratified the act of the tortfeasor. In order that there may be a valid ratification, there must be both a knowledge of the fact to be ratified and an intention to ratify it (*f*).

Liability of Servants or Agents for Torts.—An agent or servant cannot escape liability for a tortious

(*d*) Lindley, Partnership, 6th ed., 166.

(*e*) 6 M. & G. 236, 242.

(*f*) *Edwards v. London and North-Western Railway Company*, L. R. 5 C. P. 445, 449; *Roe v. Birkenhead, &c., Railway Company*, 7 Ex. 36; *Marsh v. Joseph* (1897), 1 Ch. 213.

act by shewing that he did it for some one else. In other words, an agent or servant is personally responsible for his own misfeasances and positive wrongs, whether he has committed them intentionally, or ignorantly, by the authority of his principal or master; for the latter could not confer upon him any authority to commit a tort upon the rights or property of another (*g*). Thus, if A. delivers his horse to a blacksmith, and he delivers him to another blacksmith, who wantonly lames him, A. may have an action against the latter (though A. did not authorise the bailment), for he is a wrongdoer (*h*). So if an auctioneer be employed by a sheriff to sell goods which have been unlawfully seized upon an execution (as if the goods did not belong to the execution debtor), the auctioneer who sells may be liable to an action for conversion equally with the sheriff (*i*). And so is he liable where he sells and delivers for the grantor of a bill of sale the goods comprised therein (*k*). This may be taken as an example of the general rule, re-affirmed in the House of Lords, that "any person who, however innocently, obtains possession of the goods of a person who has been fraudulently deprived of them, and disposes of them, whether for his own benefit or that of any other person, is guilty of a conversion" (*l*). But if in such a case the auctioneer does not sell or give any title to the goods, but acts as a mere intermediary or conduit-pipe in delivering possession of the goods, he will not be guilty of a conversion (*m*).

A still stronger example of the general rule that a man who has done a wrong is responsible for that

(*g*) See Story on Agency, § 311; *Stephens v. Elwell*, 4 M. & S. 259.

(*h*) Rolle's Abridgement: *Action sur case*, p. 90, O. 2, I. 20.

(*i*) See *Adamson v. Jarvis*, 4 Bing. 66; *Cochrane v. Rymill*, 40 L. T. 744.

(*k*) *Consolidated Company v. Curtis* (1892), 1 Q. B. 495; explaining *Turner v. Hockey*, 56 L. J. Q. B. 301, and following *Barker v. Furlong* (1891), 2 Ch. 172.

(*l*) *Hollins v. Fowler*, L. R. 7 H. of L. 757, at p. 795.

(*m*) *National Mercantile Bank v. Rymill*, 44 L. T. 767; *Consolidated Company v. Curtis*, *supra*.

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wrong is furnished by *Mill v. Hawker* (*n*), where a surveyor of a highway board, who by 25 & 26 Vict. c. 61, s. 16, was bound in all respects to conform to the orders of the board in the execution of his duties, removed by their direction a lock from a gate placed by the plaintiff across a path which the board alleged to be a highway, and which the plaintiff contended was not. The board, in directing the surveyor to remove the gate, acted without jurisdiction, and it was held in the Exchequer Chamber that the surveyor was liable for the unlawful act of removing the gate, and that the effect of s. 16, just referred to, was that it made him the executive officer of the board, and any orders which he might receive to carry out their *lawful* duties were orders which he was bound to obey, but that he was not justified in obeying orders which were not of that description.

But mere ministerial officers of a court of justice, whose duty it is to carry into effect the orders of the Court, are not responsible to third parties for properly carrying out such orders, although the orders made by the Court, and upon which they have acted, may be bad (*o*).

Again, where a mere intermediate agent employs a person on behalf of the principal, the intermediate agent is not liable for that person's tortious acts, and the action must be brought against that person or against the principal (*p*). Thus, a messenger who simply delivers a letter, not knowing what is in it, is not responsible for the orders it contains; and if a servant were sent with a message to a broker and said, "My master desires you to distrain for rent due to him," he would not be the person ordering the making of the distress (*q*). So, too, a servant or agent is not liable for the tortious acts of labourers whom he

(*n*) L. R. 10 Ex. 92.

(*o*) *Mill v. Hawker*, L. R. 10 Ex. 92; *Andrews v. Marris*, 1 Q. B. 3; *Dews v. Riley*, 11 C. B. 434.

(*p*) See Story on Agency, § 313; *Bennett v. Bayes*, 5 H. & N. 391.

(*q*) *Bennett v. Bayes*, *ubi supra*.

has hired for his master or principal, unless indeed he has particularly ordered those acts to be done (r). CHAP. X.

Independent Contractors.—Though a person may be responsible for the tortious acts of his servants acting in the course of their employment, he is not, as a general rule, responsible for the tortious acts of a person who is not his servant, but an independent contractor, or the servants of that person. “If an independent contractor is employed to do a lawful act, and in the course of the work he or his servants commit some casual act of wrong or negligence, the employer is not answerable” (s). Thus, a butcher bought a bullock and employed a licensed drover to drive the animal to his slaughter-house. The drover employed a boy to drive the bullock along with some others. Owing to the boy’s negligence, mischief was done by the bullock, but it was held that the butcher was not answerable for it, he having employed a person exercising an independent employment, through the negligence of whose servant the mischief was occasioned. According to Coleridge, J., the butcher would not have been liable if the drover himself had been guilty of the negligence (t). In another case, the defendant, a builder, had contracted with the committee of a club to make alterations in a club-house, and then contracted with a gasfitter for the doing of that part of the work which related to the gas-fittings. Through the negligence of the gasfitter or his servants an explosion took place and caused injury to the plaintiff, and it was held that the defendant was not responsible for such injury, but that the gasfitter was (u).

Principal, *as a general rule*, not liable for torts of “independent contractor” employed by him :

Another example of the general rule will be found in *Overton v. Freeman* (x). In that case, A. contracted

(r) *Stone v. Cartwright*, 6 T. R. 411.

(s) *Pickard v. Smith*, 10 C. B. N. S. 470, at p. 480.

(t) *Milligan v. Wedge*, 12 A. & E. 737.

(u) *Rapson v. Cubitt*, 9 M. & W. 710.

(x) 11 C. B. 867.

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with a parish to do certain paving, and entered into a sub-contract with B. to lay down the paving, the materials being supplied by A., and brought to the spot in his carts. Preparatory to the paving, the stones were laid by B.'s labourers on the pathway, and left unguarded there during the night. The plaintiff fell over the stones and broke his leg, and thereupon brought an action against A.: held, that he was not liable, as the negligence was the negligence of the servants of B., an independent contractor. But it was intimated that if the defendant had been present and directed or sanctioned the doing of the act complained of, he would have been responsible.

It remains now to see what *exceptions* there are to the general rule above stated which releases a person from responsibility for the torts of an independent contractor.

except (1)
where the act
ordered to be
done is unlaw-
ful ;

(1) In the first place, the general rule only applies where the act ordered to be done is a lawful act, and so a person who employs another to do an unlawful act will be liable for damage resulting from the doing of such unlawful act. For example, a gas company contracted with one Watson for the laying down of gas-pipes in the streets of Sheffield, but they had no special powers to lay down such pipes in the streets. Watson's workmen left on one of the streets a heap of stones and earth, dug out of one of the trenches which they had made for the gas-pipes. The plaintiff stumbled over the heap and was injured, and it was held that the gas company were liable to him in damages (*y*).

or (2) where
the work is
done in an
imperfect or
improper
manner ;

(2) Though the thing contracted to be done for the employer be not unlawful, yet if the damage is caused by the doing of that in an imperfect or improper manner, and is not caused by negligence collateral to

(*y*) *Ellis v. Sheffield Gas Consumers' Company*, 2 E. & B. 767.

the contract, the employer will be liable. Thus, a railway company were authorised by Act of Parliament to construct a swing bridge over a navigable river, and the Act provided that they should not detain vessels navigating beyond a certain time. They employed a contractor to construct the bridge in conformity with the Act, but, before the work was completed, the bridge, through some defect in its construction, could not be opened, and the plaintiff's vessel was detained for a long time, and the railway company were in consequence held responsible (z). But where defendants employed a contractor to build a bridge, and one of his men carelessly let a stone fall on the plaintiff, the defendants were not liable for this *collateral* or casual negligence (a).

(3) Where a person causes something to be done, the doing of which casts on him a duty, he cannot escape from the responsibility attaching to him of seeing that duty performed, by delegating it to a contractor. The case of *Hole v. Sittingbourne, &c., Railway Company* (b) may be cited as an illustration of this rule also.

or (3) where a duty is cast on the employer

So also in *Pickard v. Smith* (c), the defendant had a coal-cellar opening by a trap-door in a platform where passengers by a railway might lawfully walk. He employed a coal-merchant to put coals into the cellar, and, owing to the servants of the coal-merchant leaving the trap-door open, the plaintiff was injured. The defendant was held responsible, as there was a duty upon him, as the occupier of the cellar, if he caused the trap-door to be opened, to take reasonable precautions not to injure persons using the platform, and he could not escape responsibility by shifting that duty to another person. But the coal-merchant also

(z) *Hole v. Sittingbourne and Sheerness Railway Company*, 6 H. & N. 488.

(a) *Reedie v. London and North-Western Railway Company*, 4 Ex 244; 20 L. J. Ex. 65.

(b) *Ubi supra*.

(c) 10 C. B. N. S. 470.

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might have been made answerable for the negligence of his servants (*d*).

Again, in *Tarry v. Ashton* (*e*) it was held by the majority of the Court that where a person maintains a lamp projecting over the highway for his own purposes it is his duty to maintain it so as not to be dangerous to the public, and he cannot get rid of his liability for not having kept it in repair, by shewing that he had employed a competent person to put it into repair (*f*). And if the owner of land becomes aware of a state of things existing on his premises, caused though it may be by the act of a stranger, which is a source of risk and danger, a duty is imposed on him to guard against that risk and danger (*g*).

or (*4*) where, from the nature of the act, injurious consequences are likely to arise ;

(4) Where a man orders work to be executed, from which in the natural course of things injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, he must see that those means are adopted, and cannot relieve himself of responsibility by employing some one else, whether a contractor or another person, to do what is necessary (*h*).

Plaintiff and defendant were respective owners of two adjoining houses, plaintiff being entitled to the support for his house of the defendant's soil. Defendant contracted with a builder to pull down his house, excavate the foundations, and rebuild it, the builder undertaking to shore up and support the plaintiff's house and make good any damage caused by the works. The plaintiff's house was injured owing to

(*d*) *Whiteley v. Pepper*, 2 Q. B. D. 276.

(*e*) 1 Q. B. D. 314.

(*f*) See also *Gray v. Pullen*, 5 B. & S. 970 ; *Dalton v. Angus*, 6 App. Cas. 740, 829.

(*g*) *Silverton v. Marriott*, 59 L. T. 61.

(*h*) *Bower v. Peate*, 1 Q. B. D. 321. See *Dalton v. Angus*, 6 App. Cas. 740 ; and *cf. Hughes v. Percival*, 8 App. Cas. 443.

the insufficient measures taken by the builder to support it, and it was held, on the principle just stated, that the defendant was liable for such injury (*i*).

Again, the defendant was the owner of a house standing at the corner of two streets between a house belonging to the plaintiff and a house occupied by one Barron. The defendant employed a competent architect and competent builders to rebuild his house, which was to be a storey higher than the old one, and the basement was to be somewhat lower. When the house was nearly finished, the builder's workmen, for the purpose of fixing a staircase, negligently, and without the knowledge of the defendant or his architect, cut into an old portion of the party-wall, which had not been rebuilt, dividing the defendant's house from Barron's, in consequence of which the defendant's house fell, and the fall dragged over the party-wall between it and the plaintiff's house, and so injured the plaintiff's house. The cutting into the first-named party-wall was not authorised by the contract between the defendant and the builders. Under these circumstances, it was held that a duty lay upon the defendant in rebuilding his house to see that reasonable care and skill were exercised in those operations which involved risk to the plaintiff (but not so that he should be an insurer), and that he could not get rid of his responsibility by transferring that duty to another (*j*).

In one of the most recent cases on the subject, a district council employed a contractor to construct a sewer for them, and in consequence of his negligence in doing the work a gas main was broken, and gas escaping from it eventually found its way to the house where the plaintiffs lived, and an explosion took place, which caused injuries to them. The council were held

(*i*) *Bower v. Peate*, *ubi supra*.

(*j*) *Percival v. Hughes*, 9 Q. B. D. 441; in H. of L., *Hughes v. Percival*, 8 App. Cas. 443.

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responsible as they had not taken reasonable precautions to guard against the risks involved in digging near gas-pipes (*k*).

On consideration, it will appear that there are many cases which may indifferently be placed either under exception (3) or (4).

or (5) where there is an implied warranty by the principal that due care has been exercised.

(5) A fifth exception may perhaps be mentioned, and that is that, where, in a contract for valuable consideration, there is an implied warranty that due care and skill have been exercised in the construction of a building or the making of an article so as to make them reasonably fit for the purpose required, responsibility cannot be got rid of by shewing that any negligence in the construction of the building or article was the negligence of an independent contractor.

Thus, in *Francis v. Cockrell* (*l*), the defendant, acting on behalf of himself and others interested in certain races, entered into a contract with certain builders for the erection of a grand stand for the purpose of viewing the races, and the defendant employed a person who received five shillings (to be appropriated to the race fund) from every person admitted to the stand. The builders were competent persons to employ for the erection of such a stand, but it was negligently and improperly constructed (though not to the knowledge of the defendant), and, in consequence, it fell, and injured the plaintiff, who was one of the persons admitted. The Court held that an action was maintainable for such injuries by the plaintiff against the defendant, notwithstanding the fact that the defendant was free from negligence himself, and had employed competent builders, on the ground that there was an implied contract between

(*k*) *Hardaker v. Idle District Council* (1896), 1 Q. B. 335. See the judgment of A. L. Smith, L.J.; that of Lindley, L.J., refers to breach of duty, without dwelling particularly on the dangerous nature of the work. For another illustration see *Black v. Christchurch Finance Company* (1894), App. Cas. 48.

(*l*) L. R. 5 Q. B. 184, 501.

the plaintiff and the defendant that the stand, which had been let to the plaintiff and others for five shillings apiece, was reasonably fit for the purpose for which it was intended, subject only to this, that the defendant did not contract against latent defects which could not be discovered by ordinary and reasonable modes of examination.

This case follows *Readhead v. Midland Railway Company* (m), where it was held that a general carrier for hire (such as a railway company), impliedly contracts or is bound to use due care (including in that term skill and foresight), in everything that concerns the safe carriage of passengers, and the making, procuring, and using of the carriages, but he does not impliedly warrant that the carriages are perfect and free from latent defects which could not be discovered by ordinary skill, care, or foresight, nor is any such duty cast on him by the law.

Francis v. Cockrell (n) may perhaps come under exception (3), as may be seen from the judgment of Cleasby, B. (o), which was based upon the ground that the defendant had committed a *breach of duty*, and not upon the ground that he had broken an implied warranty, a point to which Brett, M.R., calls attention in *Heaven v. Pender* (p).

“Warranties implied by law are for the most part founded on the presumed intention of the parties, and ought certainly to be founded on reason, and with a just regard to the interests of the party who is supposed to give the warranty, as well as of the party to whom it is supposed to be given” (q). And so, where a person deposited two carriages with a livery-stable keeper, to be kept by him for reward, and the livery-

(m) L. R. 2 Q. B. 412, L. R. 4 Q. B. 379.

(n) *Ubi supra*.

(o) L. R. 5 Q. B. at p. 514.

(p) 11 Q. B. D. 503, at p. 513.

(q) *Readhead v. Midland Railway Company*, L. R. 4 Q. B. at p. 392 ; *Francis v. Cockrell*, L. R. 5 Q. B. at p. 193.

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stable keeper placed them in a shed which he had employed a competent builder to erect, but which was blown down by a high wind, whereby the carriages were damaged, it was held that, if the livery-stable keeper, who was a mere bailee for hire, had done all that an ordinarily careful man would do in the employment of the builder and the keeping of the carriages, he would be exempt from liability for damage caused by the negligence or improper conduct of the builder of which he had no notice (*r*). The Court distinguished this case from *Francis v. Cockrell* (*s*) by saying that, in that case, the defendant occupied a position analogous to that of a common carrier of passengers, whilst, in the case under consideration, the defendant was a mere private bailee, whose implied warranty would not be so extensive (*r*).

or (6) in cases under the Workmen's Compensation Act, 1897.

(6) A sixth exception to the general rule is contained in the Workmen's Compensation Act, 1897, which will be dealt with hereafter (*t*).

Damage caused by Animals.—We may next deal with the question of the liability of the owner of animals for damage caused by them. In the first place, a distinction must be drawn between animals that are *feræ naturæ* and those that are *mansuetæ naturæ*, though this distinction will be found to disappear where a person has knowledge of the mischievous propensities of one of the latter class of animals. Leaving out of consideration for the present mere trespasses by animals, the law will be found very succinctly laid down in Hale, Pleas of the Crown, vol. i. p. 430 :

“ 1. If the owner have notice of the quality of his beast, and it doth anybody hurt, he is chargeable with an action for it.

(*r*) *Searle v. Laverick*, L. R. 9 Q. B. 122. See also *Lane v. Cox* (1897), 1 Q. B. 415 (where unfurnished house let, no implied warranty as to its condition).

(*s*) *Ubi supra*.

(*t*) See *post*, p. 231.

“2. Though he have no particular notice that he did any such thing before, yet, if it be a beast that is *feræ naturæ*, as a lion, a bear, or a wolf, yea, an ape or a monkey [or an elephant (*u*)], if he get loose and do harm to any person, the owner is liable to an action for the damage; and so I knew it adjudged in *Andrew Baker's case*, whose child was bit by a monkey who broke his chain and got loose.

“3. And therefore, in case of such a wild beast, or in case of a bull or cow that doth damage, where the owner knows of it, he must at his peril keep him up safe from doing hurt, for, though he use his diligence to keep him up, if he escape and do harm the owner is liable to answer in damages.”

Leaving out cases of trespass, therefore, there is no difference, so far as the liability of the owner is concerned, between an animal *feræ naturæ* and one which, to the knowledge of the owner, has broken through the tameness of its nature (*x*). Thus, where the owner of a bull, who knew that the animal would run at anything red, drove it through the public streets, and it attacked and injured a person who wore a red handkerchief, the owner was held responsible for the injury so caused (*y*). But where a horse strayed on to a highway, and there kicked a child, the owner was held not liable, there being nothing to shew that he knew that the horse was vicious, and the Court being of opinion that it was not in the ordinary course of a horse's nature to do the act complained of (*z*).

Animals
*mansuetæ
naturæ*; re-
sponsibility of
owner having
knowledge of
mischievous
propensity.

Trespasses by Animals.—Where animals *feræ naturæ* such as are not usually kept in confinement are encouraged to settle upon the land of A., and,

(*u*) *Filburn v. People's Palace Company*, 25 Q. B. D. 258.

(*x*) *Jackson v. Smithson*, 15 M. & W. 563; *May v. Burdett*, 9 Q. B. 101.

(*y*) *Hudson v. Roberts*, 6 Ex. 697.

(*z*) *Cox v. Burbidge*, 13 C. B. N. S. 430; cf. *Lee v. Riley*, *infra*.

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passing thence, trespass upon and damage B.'s crops, A. is not liable, as the animals cease to be his when they leave his land; B.'s remedy, therefore, is to shoot or otherwise destroy the animals. Thus, a person who made two coney-burrows in his land, and put coneys in them, which increased to a great number, was held not liable for damage done by them to the crops of his neighbour (a). It may be that this decision would nowadays be held to infringe the maxim, "Sic utere tuo ut alienum non lædas;" but, at all events, it would not cover a case where a man brings to or *rears* upon his land an extraordinary quantity of game, such as pheasants, which do damage to his neighbour (b).

With regard to damages caused by the trespass of animals, domestic, or *mansuetæ naturæ*, such as cattle, horses, and the like, the owner is responsible if such damages are not too remote, and, in such a case, the question as to the owner's knowledge of the propensity of the animals does not arise: see Comyns' Digest, Trespass (C). See also *Lee v. Riley* (c), where, through the defect of a gate which the defendant was bound to repair, his horse strayed from his farm and got into an occupation road, and thence into the plaintiff's field, where it kicked the plaintiff's horse, breaking its leg. The defendant was liable, because what had happened was a proximate consequence of his negligence. Negligence, however, in such a case, is not necessary, for in *Ellis v. Loftus Iron Company* (d) the defendants' horse having injured the plaintiff's mare by kicking and biting her through a fence separating the plaintiff's land from the defendants', the defendants were held answerable, as there was an act of trespass (some part of the horse's body having been over the boundary), and as the damages were not too remote.

(a) *Bowlston v. Hardy*, 2 Cro. Eliz. 547.

(b) *Farrer v. Nelson*, 15 Q. B. D. 258.

(c) 18 C. B. N. S. 722.

(d) L. R. 10 C. P. 10.

Dogs.—The common usage of mankind allows dogs a certain amount of liberty, and where a person's dog commits an unauthorised trespass—for example, jumps off the road into a field without its master's consent—the owner is not liable (*e*). Again, in the recent case of *Sanders v. Teape* (*f*), where a dog, not known by its owner to be mischievous, playing with other dogs, jumped over a wall and fell upon the back of a person who was working in a deep hole at the other side, and injured him, it was held that there was no trespass for which the owner was responsible. But it is otherwise with authorised trespasses, and so where A. with his gun and dog trespassed on the plaintiff's land, and the dog killed a deer, A. was responsible (*g*). And an action for the destruction of game will lie against the owner of a dog which to his knowledge has a propensity for hunting game on its own account if he allow it to be at large in the neighbourhood of a place where game is kept (*h*).

Passing now from mere trespasses, it may be laid down that the owner of a dog is liable for any mischief it does, provided there is proof of the owner's knowledge of the dog's propensity to do such mischief (*i*). In the case of bites by a dog, it will not be necessary to shew that he has on a former occasion actually bitten some one; it will be sufficient to prove that the dog had, to its owner's knowledge, evinced a savage disposition by attempting to bite mankind (*k*); but it will not be sufficient to prove that the owner knew that it had bitten, or attempted to bite, another animal (*l*). The knowledge of the persons appointed by the owner to keep a dog is the owner's knowledge (*m*);

(*e*) *Brown v. Giles*, 1 C. & P. 118; *cf. Read v. Edwards*, 17 C. B. N. S. 245.

(*f*) 51 L. T. 263.

(*g*) *Beckwith v. Shordike*, 4 Burr. 2092.

(*h*) *Lee v. Riley*, 18 C. B. N. S. 722.

(*i*) *Sanders v. Teape*, 51 L. T. 263.

(*k*) *Worth v. Gilling*, L. R. 2 C. P. 1.

(*l*) *Osborne v. Chocqucel* (1896), 2 Q. B. 109.

(*m*) *Baldwin v. Casella*, L. R. 7 Ex. 325.

Seicenter a to dogs.

CHAP. X.

and so is the knowledge of the persons who have the control of the place where the dog is kept, or who manage the business carried on there (*n*); but the knowledge of a mere servant not appointed to keep the dog will not be sufficient (*o*). For injuries inflicted on cattle or sheep by a dog, the owner is answerable, even though he had no knowledge of the dog's mischievous propensity (*p*); and this is so, though the cattle or sheep may have been trespassing on the owner's land (*q*).

Master's Liability to Servants for Torts.—A master's liability to third persons for the torts of himself or his servants has already been dealt with. His liability to his servants will now be considered, first as it stands at common law, secondly, as it has been modified by the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), which came into force the 1st of January, 1880, and has been renewed from year to year from the date of its expiration in 1887, and, thirdly, as it has been modified by the Workmen's Compensation Act, 1897, which comes into force on the 1st of July, 1898 (60 & 61 Vict. c. 37). These two Acts, however, as we shall see, apply only to certain specific classes of workmen mentioned in them.

Liability of
master to
servant.

It is clear that at common law, and under the Employers' Liability Act, if a master *knowingly* puts his servant to work on that which is unsafe, whether it be plant, machinery, or premises, and the servant *does not know* it to be unsafe and is hurt thereby, the latter has a cause of action (*r*); but the master is not liable if the servant enters his employment with full

(*n*) *Stiles v. Cardiff Steam Navigation Company*, 33 L. J. Q. B. 310; *Applebee v. Percy*, L. R. 9 C. P. 647.

(*o*) *Ibid.*

(*p*) 28 & 29 Vict. c. 60.

(*q*) *Grange v. Silcock*, 13 T. L. R. 565.

(*r*) *Griffiths v. London and St. Katherine Docks Company*, 13 Q. B. D. 259.

knowledge of the danger, and chooses to risk it (s), or if the servant chooses to continue in his employment after danger has arisen (t), and when he knows that the inevitable consequence of his doing so will be that personal injury will befall him. If, for instance, a man agrees to take part in operations necessitating the production of fumes injurious to health, he cannot recover damages for bodily suffering arising therefrom, and if he knows that owing to a defect in the machinery at which he is employed he cannot perform the required operation without losing a limb he may probably be equally unable to recover damages for such loss. In such cases the maxim, "*Volenti non fit injuria*," applies. But "*Scienti non fit injuria*" is not the same as "*Volenti non fit injuria*," and the mere knowledge of a risk which exists through the negligence of an employer and which may or may not result in injury, does not necessarily preclude a workman from recovering damages for such injury. In such a case a person who relies on the maxim "*Volenti non fit injuria*" must shew a consent to the particular thing done; and the question whether a workman must be taken to have agreed that the risk of injury befalling him was to be his and not his employer's is a question of fact and not of law (u). Thus a servant does not disentitle himself to relief if, when danger arises (e.g., from the fencing of machinery breaking down), he complains to his master and the master promises to remedy the defect, and thereupon the servant, whilst continuing at work in the reasonable expectation that the master will do so, meets with an accident (x).

(s) *Holmes v. Clarke*, 6 H. & N. 349; on appeal, *Clarke v. Holmes*, 7 H. & N. 937; see also *Williams v. Clough*, 3 H. & N. 258, cases before the Act.

(t) *Woodley v. Metropolitan Railway Company*, 2 Ex. D. 384; *Smith v. Baker* (1891), App. Cas. 325, a case under the Employers' Liability Act; where *Thomas v. Quartermaine*, 18 Q. B. D. 685, is commented on; see also *Yarmouth v. France*, 19 Q. B. D. 647; and *Membery v. Great Western Railway Company*, 14 App. Cas. 179, where servant of sub-contractor knew the dangerous nature of his work.

(u) *Smith v. Baker*, *ubi supra*, pp. 336, 360-7.

(x) *Clarke v. Holmes*, *supra*.

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Master may set up contributory negligence of servant as a defence.

The contributory negligence of the servant may be set up in an action brought by him against his master (see *ante*, p. 123). Thus, in *Senior v. Ward (y)* the plaintiff's deceased husband, a coal-miner employed by the defendant, knew that the statutory rules as to testing the rope used with the cage for letting down the miners had been habitually violated, and on the morning when he met his fatal injury had been told by the banksman, when about to descend into the pit with the other miners, that they ought to wait to have the rope examined before descending, a fire having taken place the previous night. This warning was disregarded, and the rope (which had been damaged by the fire) broke, and the plaintiff's husband was killed. Under these circumstances, it was held that the contributory negligence of the plaintiff's husband was a bar to her succeeding in the action. In a somewhat similar case (z), however, it has been recently held that where there has been a breach by a master of a statutory obligation (such as testing ropes) the maxim "*Volenti non fit injuria*" does not apply: but whether in case of such a breach a master would be precluded from setting up contributory negligence of the servant (which is quite a different thing) may be a question (a).

Injury to a Servant through the Negligence of a Fellow-servant.—Before the Employers' Liability Act, 1880, came into force, it was well-established law that a master was not in general responsible to one servant for an injury occasioned to him by the negligence of a fellow-servant while they were acting in one common service, as the servant was understood to have undertaken, when he entered his employment, to run the risk of such negligence amongst other risks of the service. But this was subject to the qualification

(y) 1 El. & El. 385.

(z) *Baddley v. Granville*, 19 Q. B. D. 423.

(a) *Baddley v. Granville*, *ubi supra*; *Thomas v. Quartermaine*, *ubi supra*.

that the master had taken reasonable care to protect him from risk by associating him only with persons of ordinary care and skill (*b*), and to provide proper machinery for the work to be done (*c*). The master was also bound to take care that his own personal interference did not bring about the injury complained of (*d*).

A definition of the rule as to common service may be found in *Charles v. Taylor*, 3 C. P. D. 492, where, at p. 496, Brett, M.R., says: "When the two servants are servants of the same master, and where the service of each will bring them so far to work in the same place and at the same time that the negligence of one in what he is doing as part of the work which he is bound to do may injure the other whilst doing the work which he is bound to do, the master is not liable to the one servant for the injury of the other." There must not only be common employment, but common employment under the master whose servant was guilty of negligence (*e*). The captain and crew of a ship, both being employed by the owners, are in common employment (*f*).

Common service—what is.

The rule will apply even where a person is only temporarily or for a particular occasion in the service of another (*e*); and where a person volunteers to assist the servant of another in his work (*g*); but where such assistance is given with the consent of the employer by a third party, in a matter of common interest to both, the rule will not apply—where, for example, a person assists the porters at a railway station in order to get delivery of his goods (*h*).

(*b*) *Hutchinson v. York, &c., Railway Company*, 5 Ex. 343.

(*c*) *Searle v. Lindsay*, 11 C. B. N. S. 429.

(*d*) *Roberts v. Smith*, 2 H. & N. 213; *Griffiths v. Gidlow*, 3 H. & N. 648.

(*e*) *Johnson v. Lindsay*, (1891) App. Cas. 371; *Cameron v. Nystrom*, (1893) App. Cas. 308.

(*f*) *Hedley v. Pinkney*, (1894) App. Cas. 222, where the Irish case of *Ramsay v. Quinn*, 8 Ir. Rep. C. L. 322, was disapproved.

(*g*) *Degg v. Midland Railway Company*, 1 H. & N. 773.

(*h*) *Wright v. London and North Western Railway Company*, 1 Q. B. D. 252.

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Employers' Liability Act, 1880.—The main, although not the sole, object of this Act was to place masters who do not, upon the same footing of responsibility with those who do, personally superintend their works and workmen, by making them answerable for the negligence of those persons to whom they intrust the duty of superintendence, as if it were their own. In effecting this object the Legislature in many instances enacted what were acknowledged principles of the common law (*i*). The substance of the Act is as follows :

S. 1. Where after the commencement of the Act, personal injury is caused to a *workman* (*k*)—

(1.) By reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer ; or

(2.) By reason of the negligence of any person in the service of the employer “who has any superintendence entrusted to him” whilst in the exercise of any such superintendence ; or

(3.) By reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform, and did conform, where such injury resulted from his having so conformed ; or

(4.) By reason of the act or omission of any person in the service of the employer done or made in obedience to the rules or bye-laws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf ; or

(5.) By reason of the negligence of any person in the service of the employer who has the charge

(*i*) *Smith v. Baker*, *ubi supra*, at p. 354.

(*k*) See s. 8, *post*.

or control of any signal, points, locomotive engine, or train upon a railway, CHAP. X.

in any of such cases the workman, or, in case the injury results in death, the personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of, the employer, nor engaged in his work.

The following decisions on the various sub-sections of s. 1, with which must be read s. 2, are material :

Decisions on
the Employers'
Liability Act,
1880.

Sub-s. 1. There may be a defect in the condition of machinery where a machine, though not defective in its construction, is, in the circumstances in which it is used, calculated to cause injury (*l*). A horse may be "plant" within the sub-section, and if the horse is vicious its vice may be a "defect" (*m*). A "way" need not be marked out by metes or bounds or habitually used as a way: any space which a workman may have to traverse for the purposes of his work may be a "way" (*n*). A defect in a way within sub-s. 1 means a defect of a chronic character, and not a defect arising from negligent user, and so when an obstacle was negligently allowed to project into a way this was held not to be a defect within the sub-section; nor was the temporary removal of the lid of a catch-pit in a "way," which catch-pit had for some years been kept covered (*o*). In these two cases, however, the workman might have had a remedy under sub-s. 2, if there was negligence on the part of any superintendent (*o*). In the catch-pit case the lid

(*l*) *Heske v. Samuelson*, 12 Q. B. D. 30; *Cripps v. Judge*, 13 Q. B. D. 583; *Weblin v. Ballard*, 17 Q. B. D. 122; but as to this last case *cf. Thomas v. Quartermaine*, 18 Q. B. D. 685, at p. 699; see also *Smith v. Baker*, (1891) App. Cas. 325.

(*m*) *Yarmouth v. France*, 19 Q. B. D. 647.

(*n*) *Willets v. Watt & Co.*, (1892) 2 Q. B. D. 92.

(*o*) *McGiffin v. Palmer's Shipbuilding, &c., Company*, 10 Q. B. D. 5; *Willets v. Watt & Co.*, *ubi supra*.

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would seem to have been properly removed (*p*): but where the movable guard of dangerous machinery had been improperly removed there was evidence of a defect (*p*). The mere fact that a machine is dangerous to a workman employed to work with it does not shew that there is a defect in it (*q*), but much will depend on findings of fact: thus, where the roller of a jute machine was in several sections, instead of one piece, and the spaces between the sections got occasionally clogged with jute, which it was usual to remove with the hand, and the plaintiff put three fingers in, so removing the jute, the employer was held liable, on the finding of the jury, for a defect in the machine known to him (*r*).

The word "works" means works already completed, and not works which on completion will be connected with or used in the business of the employer (*s*): but ground which an employer has contracted to clear of old buildings and to cover with new, may be considered his "works" (*t*).

Sub-s. 2. See notes on s. 8, *post*, p. 228.

Sub-s. 3. The orders or directions need not be express, but may be implied from the circumstances (*u*). The sub-section will not be applicable if A. merely tells B. what work he has to do, but does not exercise control over him by telling him where or at what time or how to do it (*x*). It is not necessary to shew that the plaintiff's injury arose from an order which was negligent in itself, or that the conformity to the order was the *causa causans* of the injury: but the injury must have been the result of the negligence of

(*p*) See *Tate v. Latham and Son*, (1897) 1 Q. B. 502.

(*q*) *Walsh v. Whitley*, 21 Q. B. D. 371.

(*r*) *Paley v. Garnett*, 16 Q. B. D. 52.

(*s*) *Howe v. Finch*, 17 Q. B. D. 187.

(*t*) *Brunnigan v. Robinson*, (1892) 1 Q. B. 344.

(*u*) *Milward v. Midland Railway Company*, 14 Q. B. D. 68.

(*x*) *Snowden v. Baines*, 25 Q. B. D. 193.

the person giving the order, and of the plaintiff conforming to such order (*y*). CHAP. X.

Sub-s. 5. The word "railway" is not confined to railways belonging to railway companies (*z*). A series of trucks on a railway without a locomotive engine may constitute a "train upon a railway:" and a person whose duty it is to move them by means of a stationary hydraulic engine and a capstan may be a person who has the charge or control of such a train (*a*). "A person who has charge or control of a train" does not necessarily cease to have charge, because some of the waggons are uncoupled to be separately dealt with, and the person left in charge of those waggons may also fall within these words (*b*). But a person cannot be said to have charge or control of "points" on a railway whose duty, acting under an inspector, is to clean, oil, and adjust them (*c*).

By s. 8, "workman" means a railway servant and any person to whom the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), applies—viz., one who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour, has entered into a contract, express or implied, oral or otherwise, with an employer (but not a domestic or menial servant). A person will not be deemed to be engaged in manual labour within the meaning of the Employers' Liability Act where such labour is not his real and substantial employment, but merely incidental or ancillary thereto (*d*). Thus, a grocer's assistant whose duty is to serve customers in a shop is not within the Act, though he has also certain duties involving manual labour, such as making up parcels, and carrying them from the shop to a cart at the door (*d*). So

(*y*) *Wild v. Waygood*, (1892) 1 Q. B. 783.

(*z*) *Doughty v. Fierbank*, 10 Q. B. D. 358.

(*a*) *Cox v. Great Western Railway Company*, 9 Q. B. D. 106.

(*b*) *McCord v. Cammell & Co.*, (1896) App. Cas. 57.

(*c*) *Gibbs v. Great Western Railway Company*, 12 Q. B. D. 208.

(*d*) *Bound v. Lawrence*, (1892) 1 Q. B. 226.

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also the conductor of an omnibus (*e*), the driver of a tramcar (*f*), and the guard of a goods' train (*g*) are excluded from the benefit of the Act.

“A person who has superintendence entrusted to him” means a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labour (*s. 8*) (*h*). But the fact that such superintendent, when negligent, is voluntarily assisting in manual labour, will not release the employer from liability (*i*).

S. 2. A workman will not be entitled to any right of compensation or remedy under the Act in a case under *s. 1*, sub-*s. 1*, unless the defect there mentioned arose from, or had not been discovered or remedied owing to, the negligence of the employer, or of some person in the service of the employer, and entrusted by him with the duty of seeing that the ways, works, machinery or plant were in proper condition (*k*). Nor will he have such right under sub-*s. 4* of *s. 1* unless the injury resulted from some impropriety or defect in the rules, bye-laws, or instructions therein mentioned; but rules sanctioned by a department of State or Act of Parliament will not be deemed improper or defective: nor, again, in any case where the workman knew of the defect or negligence which caused his injury, and failed within a reasonable time to give information of it to the employer or some person superior to himself in the service of the employer, unless he was aware that the employer or such superior already knew of such defect or negligence.

(*e*) *Morgan v. London General Omnibus Company*, 13 Q. B. D. 832.

(*f*) *Cook v. North Metropolitan Tramways Company*, 18 Q. B. D. 683.

(*g*) *Hunt v. Great Northern Railway Company*, (1891) 1 Q. B. 601.

(*h*) For cases where persons were held to be ordinarily engaged in manual labour and not superintendents, see *Shaffers v. General Steam Navigation Company*, 10 Q. B. D. 356, and *Kellard v. Rooke*, 21 Q. B. D. 367.

(*i*) *Osborne v. Jackson*, 11 Q. B. D. 619.

(*k*) See *Tate v. Latham and Son*, (1897) 1 Q. B. 502.

Actions under this Act are to be brought in the county court (s. 6), and must be commenced within six months from the occurrence of the accident causing the injury, or, in case of death, within twelve months from the death; but the action must be preceded by a notice that the injury has been sustained, which must be given within six weeks, and state the name and address of the person injured and the cause of the injury, and the date when it was sustained, and be served on the employer (*l*). In the case of death, the want of such notice shall not be a bar to the action if the judge shall be of opinion that there was a reasonable excuse for such want of notice (s. 4).

The amount of compensation recoverable under the Act is limited to the amount of the estimated earnings, during the three years preceding the injury, of a person in the same grade employed during those years in the like employment and in the same district as the injured workman: subject to the deduction therefrom of any penalty or part of a penalty which may have been paid in pursuance of any other Act to the workmen or his representatives in respect of the same cause of action (ss. 3 and 5). An apprentice cannot take into account what he would be able to earn if he were out of his apprenticeship, nor the value of the tuition given him (*m*).

It has been held that an employer and workman may contract themselves out of the Act (*n*).

Workmen's Compensation Act, 1897.—We now come to the Workmen's Compensation Act, 1897, which comes into force on July 1, 1898, and as regards certain employments referred to in s. 7 creates a revolution in our law. By that section the

(*l*) Ss. 6 and 7; as to sufficiency of notice, see *Moyle v. Jenkins*, 8 Q. B. D. 116; *Keen v. Millwall Dock Company*, 8 Q. B. D. 482; *Stone v. Hyde*, 9 Q. B. D. 76; *Clarkson v. Musgrave*, 9 Q. B. D. 386; *Carter v. Drysdale*, 12 Q. B. D. 91.

(*m*) *Noel v. Redruth Foundry Company*, (1896) 1 Q. B. 453.

(*n*) *Griffiths v. Lord Dudley*, 9 Q. B. D. 357.

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Act is to apply only to an employment by the “undertakers” as defined therein on or in or about a *railway, factory, mine, quarry, engineering work, or certain buildings* exceeding thirty feet in height.

Effect of the Act.

The broad features of the Act, where applicable, are as follows :—

(1.) The doctrine of common employment (see *ante*, p. 224) is abolished.

(2.) The employer is liable to pay compensation where personal injury by accident arising out of and in the course of a workman’s employment is caused to the workman, though neither the employer nor those for whom he is responsible have been guilty of negligence.

(3.) The defence of contributory negligence is practically abolished, the nearest approach to it being s. 1, sub-s. 2 (c): “If it is proved that the injury to the workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall be disallowed.”

(4.) Where there is a sub-contract with an independent contractor for the execution of works coming within the trade or business of the head contractor or “undertaker” as defined by s. 7, the head contractor or undertaker may be liable to pay compensation for accidents to the workmen employed by the independent contractor, but has the right of indemnity mentioned in s. 4: see also s. 6 as to strangers.

(5.) Employers and workmen coming within the Act cannot contract themselves out of it except by a scheme sanctioned by the Registrar of Friendly Societies: ss. 3 and 9.

(6.) The liability to pay compensation and the amount thereof are to be determined by arbitration.

(7.) A “workman” includes every person engaged in an employment to which the Act applies, whether by way of manual labour or otherwise; and where injuries result in his death the benefits of the Act go to his representatives or dependants or others entitled to compensation. “Dependants” mean in England or Ireland such persons specified in the Fatal Accidents Act, 1846 (generally known as Lord Campbell’s Act: see *ante*, p. 15), as were wholly or in part dependent on the earnings of the workman at the time of his death: and in Scotland those who were so dependent and would by the law of Scotland be entitled to sue the employer for damages or solatium in respect of the death.

(8.) An employer is not liable under the Act for an injury which does not disable the workman for at least two weeks from earning full wages.

(9.) Where an injury is caused by the personal negligence or wilful act of the employer, or of some person for whose act or default he is responsible, the workman may claim compensation under the Act, or take the proceedings that were open to him at the commencement of the Act.

(10.) Where an employer becomes bankrupt or compounds or arranges with his creditors, or if the employer is a company winding-up has commenced, an injured workman has a first charge on any money payable to the employer under an insurance against liability under the Act: s. 5.

The schedules to the Act regulate the scale of compensation allowed in cases under the Act, and the procedure in arbitrations.

The Act is as follows:—

WORKMEN’S COMPENSATION ACT, 1897.

1.—(1.) If in any employment to which this Act applies personal injury *by accident arising out of and in the course of the employment* is caused to a workman, his employer shall, Liability of certain employers to workmen for injuries.

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subject as herein-after mentioned, be liable to pay compensation in accordance with the First Schedule to this Act.

(2.) Provided that :—

- (a.) The employer shall not be liable under this Act in respect of any injury which does not disable the workman for a period of at least two weeks from earning full wages at the work at which he was employed ;
- (b.) When the injury was caused by the personal negligence or wilful act of the employer, or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act, or take the same proceedings as were open to him before the commencement of this Act ; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act, and shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid ;
- (c.) If it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall be disallowed.

(3.) If any question arises in any proceedings under this Act as to the liability to pay compensation under this Act (including any question as to whether the employment is one to which this Act applies), or as to the amount or duration of compensation under this Act, the question, if not settled by agreement, shall, subject to the provisions of the First Schedule to this Act, be settled by arbitration, in accordance with the Second Schedule to this Act.

(4.) If, within the time herein-after in this Act limited for taking proceedings, an action is brought to recover damages independently of this Act for injury caused by any accident, and it is determined in such action that the injury is one for which the employer is not liable in such action, but that he would have been liable to pay compensation under the

provisions of this Act, the action shall be dismissed ; but the Court in which the action is tried shall, if the plaintiff shall so choose, proceed to assess such compensation, and shall be at liberty to deduct from such compensation all the costs which, in its judgment, have been caused by the plaintiff bringing the action instead of proceeding under this Act.

In any proceeding under this sub-section, when the Court assesses the compensation it shall give a certificate of the compensation it has awarded and the directions it has given as to the deduction for costs, and such certificate shall have the force and effect of an award under this Act.

(5.) Nothing in this Act shall affect any proceeding for a fine under the enactments relating to mines or factories, or the application of any such fine, but if any such fine, or any part thereof, has been applied for the benefit of the person injured, the amount so applied shall be taken into account in estimating the compensation under this Act (o).

2.—(1.) Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured, and unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury, or, in case of death, within six months from the time of death. Provided always that the want of or any defect or inaccuracy in such notice shall not be a bar to the maintenance of such proceedings, if it is found in the proceedings for settling the claim that the employer is not prejudiced in his defence by the want, defect, or inaccuracy, or that such want, defect, or inaccuracy was occasioned by mistake or other reasonable cause.

Time for taking proceedings.

(2.) Notice in respect of an injury under this Act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date at which it was sustained, and shall be served on the

(o) S. 1, sub-s. 2 (b) reserves to a workman the right to take proceedings under the Employers' Liability Act, or at Common Law in the cases mentioned in the sub-section, whilst sub-s. 4 provides for cases where proceedings are wrongly taken outside the present Act.

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employer, or, if there is more than one employer, upon one of such employers (*p*).

(3.) The notice may be served by delivering the same to or at the residence or place of business of the person on whom it is to be served.

(4.) The notice may also be served by post by a registered letter addressed to the person on whom it is to be served at his last known place of residence or place of business, and if served by post shall be deemed to have been served at the time when the letter containing the same would have been delivered in the ordinary course of post, and in proving the service of such notice it shall be sufficient to prove that the notice was properly addressed and registered.

(5.) Where the employer is a body of persons corporate or unincorporate, the notice may also be served by delivering the same at, or by sending it by post in a registered letter addressed to the employer at, the office, or, if there be more than one office, any one of the offices of such body.

Contracting
out.

3.—(1.) If the Registrar of Friendly Societies, after taking steps to ascertain the views of the employer and workmen, certifies that any scheme of compensation, benefit, or insurance for the workmen of an employer in any employment, whether or not such scheme includes other employers and their workmen, is on the whole not less favourable to the general body of workmen and their dependants than the provisions of this Act, the employer may, until the certificate is revoked, contract with any of those workmen that the provisions of the scheme shall be substituted for the provisions of this Act, and thereupon the employer shall be liable only in accordance with the scheme, but, save as aforesaid, this Act shall apply notwithstanding any contract to the contrary made after the commencement of this Act (*q*).

(2.) The registrar may give a certificate to expire at the end of a limited period not less than five years.

(*p*) The notice should be in writing: see subsequent sub-sections; see also *Moyle v. Jenkins*, 8 Q. B. D. 116; *Keen v. Millwall Dock Company*, 8 Q. B. D. 482.

(*q*) This is the only mode in which parties can contract themselves out of the Act: *cf.*, as to Employers' Liability Act, *Griffiths v. Lord Dudley*, 9 Q. B. D. 357, *ante*, p. 231. See also s. 9, *post*.

(3.) No scheme shall be so certified which contains an obligation upon the workmen to join the scheme as a condition of their hiring.

(4.) If complaint is made to the Registrar of Friendly Societies by or on behalf of the workmen of any employer that the provisions of any scheme are no longer on the whole so favourable to the general body of workmen of such employer and their dependants as the provisions of this Act, or that the provisions of such scheme are being violated, or that the scheme is not being fairly administered, or that satisfactory reasons exist for revoking the certificate, the registrar shall examine into the complaint, and, if satisfied that good cause exists for such complaint, shall, unless the cause of complaint is removed, revoke the certificate.

(5.) When a certificate is revoked or expires any moneys or securities held for the purpose of the scheme shall be distributed as may be arranged between the employer and workmen, or as may be determined by the Registrar of Friendly Societies in the event of a difference of opinion.

(6.) Whenever a scheme has been certified as aforesaid, it shall be the duty of the employer to answer all such inquiries and to furnish all such accounts in regard to the scheme as may be made or required by the Registrar of Friendly Societies.

(7.) The Chief Registrar of Friendly Societies shall include in his annual report the particulars of the proceedings of the Registrar under this Act.

4. Where, in an employment to which this Act applies, the undertakers as herein-after defined contract with any person for the execution by or under such contractor of any work, and the undertakers would, if such work were executed by workmen immediately employed by them, be liable to pay compensation under this Act to those workmen in respect of any accident arising out of and in the course of their employment, the undertakers shall be liable to pay to any workman employed in the execution of the work any compensation which is payable to the workman (whether under this Act or in respect of personal negligence or wilful act independently of this Act) by such contractor, or would be so payable if such contractor were an employer to whom this Act applies.

Sub-con-
tracting.

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Provided that the undertakers shall be entitled to be indemnified by any other person who would have been liable independently of this section.

This section shall not apply to any contract with any person for the execution by or under such contractor of any work which is merely ancillary or incidental to, and is no part of, or process in, the trade or business carried on by such undertakers respectively (r).

Compensation to workmen in case of bankruptcy of employer.

5.—(1.) Where any employer becomes liable under this Act to pay compensation in respect of any accident, and is entitled to any sum from insurers in respect of the amount due to a workman under such liability, then in the event of the employer becoming bankrupt, or making a composition or arrangement with his creditors, or if the employer is a company of the company having commenced to be wound up, such workman shall have a first charge upon the sum aforesaid for the amount so due, and the judge of the county court may direct the insurers to pay such sum into the Post Office Savings Bank in the name of the registrar of such court, and order the same to be invested or applied in accordance with the provisions of the First Schedule hereto with reference to the investment in the Post Office Savings Bank of any sum allotted as compensation, and those provisions shall apply accordingly.

(2.) In the application of this section to Scotland, the words "have a first charge upon" shall mean "be preferentially entitled to."

Recovery of damages from stranger.

6. Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability (s) in some person other than the employer to

(r) This section makes an "undertaker" as defined by s. 7, or ultimate employer, liable for injuries to workmen employed by a sub-contractor to do work within the ordinary trade or business of the "undertaker," in cases where the undertaker would have been liable under the Act, if he himself had employed the workmen, and where the sub-contractor is liable, or would have been liable if he were an employer to whom the Act applied. The undertaker, however, is entitled to be indemnified by any person who would have been liable independently of the section; *e.g.*, a negligent stranger, or the sub-contractor himself, if negligent, or if liable as an employer to whom the Act applies. Of course the section makes a great change in the law.

(s) "Legal liability" would appear to mean a liability *apart from the Act*: *e.g.*, that of a stranger, by whose negligence an employer's workman is injured.

pay damages in respect thereof, the workman may, at his option, proceed, either at law against that person to recover damages, or against his employer for compensation under this Act, but not against both, and if compensation be paid under this Act, the employer shall be entitled to be indemnified by the said other person.

7.—(1.) This Act shall apply only to employment by the undertakers as herein-after defined, on or in or about a railway, factory, mine, quarry, or engineering work, and to employment by the undertakers as herein-after defined on in or about any building which exceeds thirty feet in height, and is either being constructed or repaired by means of a scaffolding, or being demolished, or on which machinery driven by steam, water, or other mechanical power, is being used for the purpose of the construction, repair, or demolition thereof.

Application
of Act and
definitions.

(2.) In this Act—

“Railway” means the railway of any railway company to which the Regulation of Railways Act, 1873, applies, and includes a light railway made under the Light Railways Act, 1896; and “railway” and “railway company” have the same meaning as in the said Acts of 1873 and 1896: 36 & 37 Vict. c. 48. 59 & 60 Vict. c. 48.

“Factory” has the same meaning as in the Factory and Workshop Acts, 1878 to 1891 (*t*), and also includes any dock, wharf, quay, warehouse, machinery, or plant, to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895, and every laundry worked by steam, water, or other mechanical power: 58 & 59 Vict. c. 37.

“Mine” means a mine to which the Coal Mines Regulation Act, 1887, or the Metalliferous Mines Regulation Act, 1872, applies: 50 & 51 Vict. c. 58. 35 & 36 Vict. c. 77.

“Quarry” means a quarry under the Quarries Act, 1894: 57 & 58 Vict. c. 42.

(*t*) These Acts are The Factory and Workshop Act, 1878 (41 & 42 Vict. c. 16); The Factory and Workshop Act, 1883 (46 & 47 Vict. c. 53); The Cotton Cloth Factories Act, 1889 (52 & 53 Vict. c. 62); The Factory and Workshop Act, 1891 (54 & 55 Vict. c. 75).

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“Engineering work” means any work of construction or alteration or repair of a railroad, harbour, dock, canal, or sewer, and includes any other work for the construction, alteration, or repair of which machinery driven by steam, water, or other mechanical power is used :

“Undertakers” in the case of a railway means the railway company ; in the case of a factory, quarry, or laundry means the occupier thereof within the meaning of the Factory and Workshop Acts, 1878 to 1895 ; in the case of a mine means the owner thereof within the meaning of the Coal Mines Regulation Act, 1887, or the Metalliferous Mines Regulation Act, 1872, as the case may be, and in the case of an engineering work means the person undertaking the construction, alteration, or repair ; and in the case of a building means the persons undertaking the construction, repair, or demolition :

“Employer” includes any body of persons corporate or unincorporate and the legal personal representative of a deceased employer :

“Workman” includes every person who is engaged in an employment to which this Act applies, whether by way of manual labour or otherwise, and whether his agreement is one of service or apprenticeship or otherwise, and is expressed or implied, is oral or in writing. Any reference to a workman who has been injured shall, where the workman is dead, include a reference to his legal personal representative or to his dependants, or other person to whom compensation is payable (*u*).

“Dependants” means—

(a.) in England and Ireland, such members of the workman’s family specified in the Fatal Accidents Act, 1846, as were wholly or in part dependent upon the earnings of the workman at the time of his death (*x*) ; and

9 & 10 Vict.
c. 93.

(*u*) The definition of “workman” is wider than that in the Employers’ Liability Act : see *ante*, p. 229.

(*x*) For this, (Lord Campbell’s) Act, see *ante*, p. 15.

(b) in Scotland, such of the persons entitled according to the law of Scotland to sue the employer for damages or solatium in respect of the death of the workman, as were wholly or in part dependent upon the earnings of the workman at the time of his death.

(3.) A workman employed in a factory which is a ship-building yard shall not be excluded from this Act by reason only that the accident arose outside the yard in the course of his work upon a vessel in any dock, river, or tidal water near the yard.

8.—(1.) This Act shall not apply to persons in the naval or military service of the Crown, but otherwise shall apply to any employment by or under the Crown to which this Act would apply if the employer were a private person.

Application to workmen in employment of Crown.

(2.) The Treasury may, by warrant laid before Parliament, modify for the purposes of this Act their warrant made under section one of the Superannuation Act, 1887, and notwithstanding anything in that Act, or any such warrant, may frame a scheme with a view to its being certified by the Registrar of Friendly Societies under this Act.

50 & 51 Vict.
c. 67.

9.—Any contract existing at the commencement of this Act, whereby a workman relinquishes any right to compensation from the employer for personal injury arising out of and in the course of his employment, shall not, for the purposes of this Act, be deemed to continue after the time at which the workman's contract of service would determine if notice of the determination thereof were given at the commencement of this Act (y).

Provision as to existing contracts.

10.—(1.) This Act shall come into operation on the first day of July one thousand eight hundred and ninety-eight.

Commencement of Act and short title.

(2.) This Act may be cited as the Workmen's Compensation Act, 1897.

(y) Cf. sect. 3.

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Sections 1, 5.

SCHEDULES.**FIRST SCHEDULE.****SCALE AND CONDITIONS OF COMPENSATION.***Scale.*

(1.) The amount of compensation under this Act shall be—

(a) where death results from the injury—

(i.) if the workman leaves any dependants wholly dependent upon his earnings at the time of his death, a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of one hundred and fifty pounds, whichever of those sums is the larger, but not exceeding in any case three hundred pounds, provided that the amount of any weekly payments made under this Act shall be deducted from such sum, and if the period of the workman's employment by the said employer has been less than the said three years, then the amount of his earnings during the said three years shall be deemed to be 156 times his average weekly earnings during the period of his actual employment under the said employer;

(ii.) if the workman does not leave any such dependants, but leaves any dependants in part dependent upon his earnings at the time of his death, such sum, not exceeding in any case the amount payable under the foregoing provisions, as may be agreed upon, or, in default of agreement, may be determined, on arbitration under this Act, to be reasonable and proportionate to the injury to the said dependants; and

(iii.) if he leaves no dependants, the reasonable expenses of his medical attendance and burial, not exceeding ten pounds;

(b) where total or partial incapacity for work results from the injury, a weekly payment during the incapacity after the second week not exceeding fifty per cent. of his average weekly earnings during the previous twelve months, if he has been so long employed, but if not, then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed one pound.

(2.) In fixing the amount of the weekly payment, regard shall be had to the difference between the amount of the

average weekly earnings of the workman before the accident and the average amount which he is able to earn after the accident, and to any payment not being wages which he may receive from the employer in respect of his injury during the period of his incapacity.

(3.) Where a workman has given notice of an accident, he shall, if so required by the employer, submit himself for examination by a duly qualified medical practitioner provided and paid by the employer, and if he refuses to submit himself to such examination, or in any way obstructs the same, his right to compensation, and any proceeding under this Act in relation to compensation, shall be suspended until such examination takes place.

(4.) The payment shall, in case of death, be made to the legal personal representative of the workman, or, if he has no legal personal representative, to or for the benefit of his dependants, or, if he leaves no dependants, to the person to whom the expenses are due; and if made to the legal personal representative shall be paid by him to or for the benefit of the dependants or other person entitled thereto under this Act.

(5.) Any question as to who is a dependant, or as to the amount payable to each dependant, shall, in default of agreement, be settled by arbitration under this Act.

(6.) The sum allotted as compensation to a dependant may be invested or otherwise applied for the benefit of the person entitled thereto, as agreed, or as ordered by the committee or other arbitrator.

(7.) Any sum which is agreed or is ordered by the committee or arbitrator to be invested may be invested in whole or in part in the Post Office Savings Bank by the registrar of the county court in his name as registrar.

(8.) Any sum to be so invested may be invested in the purchase of an annuity from the National Debt Commissioners through the Post Office Savings Bank, or be accepted by the Postmaster-General as a deposit in the name of the registrar as such, and the provisions of any statute or regulations respecting the limits of deposits in savings bank, and the declaration to be made by a depositor, shall not apply to such sums.

(9.) No part of any money invested in the name of the registrar of any county court in the Post Office Savings Bank under this Act shall be paid out, except upon authority addressed to the Postmaster-General by the Treasury or by the judge of the county court.

(10.) Any person deriving any benefit from any moneys invested in a post office savings bank under the provisions of this Act may, nevertheless, open an account in a post office savings bank or in any other savings bank in his own name

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without being liable to any penalties imposed by any statute or regulations in respect of the opening of accounts in two savings banks, or of two accounts in the same savings bank.

(11.) Any workman receiving weekly payments under this Act shall, if so required by the employer, or by any person by whom the employer is entitled under this Act to be indemnified, from time to time submit himself for examination by a duly qualified medical practitioner provided and paid by the employer, or such other person; but if the workman objects to an examination by that medical practitioner, or is dissatisfied by the certificate of such practitioner upon his condition when communicated to him, he may submit himself for examination to one of the medical practitioners appointed for the purposes of this Act, as mentioned in the Second Schedule to this Act, and the certificate of that medical practitioner as to the condition of the workman at the time of the examination shall be given to the employer and workman, and shall be conclusive evidence of that condition. If the workman refuses to submit himself to such examination, or in any way obstructs the same, his right to such weekly payments shall be suspended until such examination has taken place.

(12.) Any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished or increased, subject to the maximum above provided, and the amount of payment shall, in default of agreement, be settled by arbitration under this Act.

(13.) Where any weekly payment has been continued for not less than six months, the liability therefor may, on the application by or on behalf of the employer, be redeemed by the payment of a lump sum, to be settled, in default of agreement, by arbitration under this Act, and such lump sum may be ordered by the committee or arbitrator to be invested or otherwise applied as above mentioned.

(14.) A weekly payment, or a sum paid by way of redemption thereof, shall not be capable of being assigned, charged, or attached, and shall not pass to any other person by operation of law, nor shall any claim be set off against the same.

(15.) Where a scheme certified under this Act provides for payment of compensation by a friendly society, the provisions of the proviso to the first subsection of section eight, section sixteen, and section forty-one of the Friendly Societies Act, 1896, shall not apply to such society in respect of such scheme.

(16.) In the application of this schedule to Scotland the expression "registrar of the county court" means "sheriff clerk of the county," and "judge of the county court" means "sheriff."

(17.) In the application of this Act to Ireland the provisions of the County Officers and Courts (Ireland) Act, 1877, with

59 & 60 Vict.
c. 25.

40 & 41 Vict.
c. 56.

respect to money deposited in the Post Office Savings Bank under that Act shall apply to money invested in the Post Office Savings Bank under this Act.

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SECOND SCHEDULE.

Section 1.

ARBITRATION.

The following provisions shall apply for settling any matter which under this Act is to be settled by arbitration :—

(1.) If any committee, representative of an employer and his workman, exists with power to settle matters under this Act in the case of the employer and workmen, the matter shall, unless either party objects, by notice in writing sent to the other party before the committee meet to consider the matter, be settled by the arbitration of such committee, or be referred by them in their discretion to arbitration as hereinafter provided.

(2.) If either party so objects, or there is no such committee, or the committee so refers the matter or fails to settle the matter within three months from the date of the claim, the matter shall be settled by a single arbitrator agreed on by the parties, or in the absence of agreement by the county court judge, according to the procedure prescribed by rules of the court, or if in England the Lord Chancellor so authorises, according to the like procedure, by a single arbitrator appointed by such county court judge.

(3.) Any arbitrator appointed by the county court judge shall, for the purposes of this Act, have all the powers of a county court judge, and shall be paid out of moneys to be provided by Parliament in accordance with regulations to be made by the Treasury.

(4.) The Arbitration Act, 1889, shall not apply to any arbitration under this Act; but an arbitrator may, if he thinks fit, submit any question of law for the decision of the county court judge, and the decision of the judge on any question of law, either on such submission, or in any case where he himself settles the matter under this Act, shall be final, unless within the time and in accordance with the conditions prescribed by rules of the Supreme Court either party appeals to the Court of Appeal; and the county court judge, or the arbitrator appointed by him, shall, for the purpose of an arbitration under this Act, have the same powers of procuring the attendance of witnesses and the production of documents as if the claim for compensation had been made by plaint in the county court.

(5.) Rules of court may make provision for the appearance in any arbitration under this Act of any party by some other person.

52 & 53 Vict.
c. 49.

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(6.) The costs of and incident to the arbitration and proceedings connected therewith shall be in the discretion of the arbitrator. The costs, whether before an arbitrator or in the county court, shall not exceed the limit prescribed by rules of court, and shall be taxed in manner prescribed by those rules.

(7.) In the case of the death or refusal or inability to act of an arbitrator, a Judge of the High Court at Chambers may, on the application of any party, appoint a new arbitrator.

(8.) Where the amount of compensation under this Act shall have been ascertained, or any weekly payment varied, or any other matter decided, under this Act, either by a committee or by an arbitrator or by agreement, a memorandum thereof shall be sent, in manner prescribed by rules of court, by the said committee or arbitrator, or by any party interested, to the registrar of the county court for the district in which any person entitled to such compensation resides, who shall, subject to such rules, on being satisfied as to its genuineness, record such memorandum in a special register without fee, and thereupon the said memorandum shall for all purposes be enforceable as a county court judgment. Provided that the county court judge may at any time rectify such register.

(9.) Where any matter under this Act is to be done in a county court, or by to or before the judge or registrar of a county court, then, unless the contrary intention appear, the same shall, subject to rules of court, be done in, or by to or before the judge or registrar of, the county court of the district in which all the parties concerned reside, or if they reside in different districts the district in which the accident out of which the said matter arose occurred, without prejudice to any transfer in manner provided by rules of court.

(10.) The duty of a county court judge under this Act, or of an arbitrator appointed by him, shall, subject to rules of court, be part of the duties of the county court, and the officers of the court shall act accordingly, and rules of court may be made both for any purpose for which this Act authorises rules of court to be made, and also generally for carrying into effect this Act so far as it affects the county court, or an arbitrator appointed by the judge of the county court, and proceedings in the county court or before any such arbitrator, and such rules may, in England, be made by the five judges of the county courts appointed for the making of rules under section one hundred and sixty-four of the County Courts Act, 1888, and when allowed by the Lord Chancellor, as provided by that section, shall have full effect without any further consent.

(11.) No court fee shall be payable by any party in respect of any proceeding under this Act in the county court prior to the award.

(12.) Any sum awarded as compensation shall be paid on the receipt of the person to whom it is payable under any agreement or award, and his solicitor or agent shall not be entitled to recover from him, or to claim a lien on, or deduct any amount for costs from, the said sum awarded, except such sum as may be awarded by the arbitrator or county court judge, on an application made by either party to determine the amount of costs to be paid to the said solicitor or agent, such sum to be awarded subject to taxation and to the scale of costs prescribed by rules of court.

(13.) The Secretary of State may appoint legally qualified medical practitioners for the purpose of this Act, and any committee, arbitrator, or judge may, subject to regulations made by the Secretary of State and the Treasury, appoint any such practitioner to report on any matter which seems material to any question arising in the arbitration; and the expense of any such medical practitioner shall, subject to Treasury regulations, be paid out of moneys to be provided by Parliament.

(14.) In the application of this schedule to Scotland—

(a.) “Sheriff” shall be substituted for “county court judge,” “sheriff court” for “county court,” “action” for “plaint,” “sheriff clerk” for “registrar of the county court,” and “act of sederunt” for “rules of court”:

(b.) Any award or agreement as to compensation under this Act may be competently recorded for execution in the books of council and session or sheriff court books, and shall be enforceable in like manner as a recorded decree arbitral:

(c.) Any application to the sheriff as arbitrator shall be heard, tried, and determined summarily in the manner provided by the fifty-second section of the Sheriff Courts (Scotland) Act, 1876, save only that parties may be represented by any person authorised in writing to appear for them, and subject to the declaration that it shall be competent to either party within the time and in accordance with the conditions prescribed by act of sederunt to require the sheriff to state a case on any question of law determined by him, and his decision thereon in such case may be submitted to either division of the Court of Session, who may hear and determine the same finally, and remit to the sheriff with instruction as to the judgment to be pronounced.

39 & 40 Vict.
c. 70.

(15.) Paragraphs four and seven of this schedule shall not apply to Scotland.

(16.) In the application of this schedule to Ireland the expression “county court judge” shall include the recorder of any city or town.

CHAPTER XI.

DAMAGES IN ACTIONS FOR TORT.

CHAP. XI. THE damages that may be recovered in actions for tort may be (1) nominal, (2) substantial or ordinary, or (3) vindictive or exemplary. “ ‘ Nominal damages ’ means a sum of money that may be spoken of, but that has no existence in point of quantity ” (a). Nominal damages may be recovered in many cases where there is no pecuniary loss, for, as Lord Holt says in *Ashby v. White* (b): “ A damage is not merely pecuniary, but every injury imports a damage when a man is thereby hindered of his right. As in an action for slanderous words, though a man does not lose a penny by reason of the speaking of them, yet he shall have an action. So if a man gives another a cuff on the ear, though it cost him nothing—no, not so much as a little diachylon—yet he shall have his action, for it is a personal injury. So a man shall have an action against another for riding over his ground, for it is an invasion of his property, and the other has no right to come there.” In the majority of cases of simple trespass upon land, probably there is no pecuniary damage that can be appreciated; and yet the plaintiff who complains of the trespass would be entitled to nominal damages, as there are all the ingredients of a tort in the act of the defendant trespasser.

In some cases
damage must
be proved.

There are, however, certain cases in which a person cannot be said to have sustained any actionable wrong unless there is some pecuniary damage. Thus, as pointed out by Lord Holt in the passage which has

(a) *Beaumont v. Greathead*, 2 C. B. 494, 499.

(b) 2 Ld. Raym. 938; 1 Sm. L. C. 268.

been cited, a man may have an action for slanderous words though they do not cause him the loss of a penny; yet this must be taken to refer to words that are actionable in themselves—the various classes of which have been already given—and in which the law implies damage. But when the defamatory words complained of are not actionable in themselves, the person of whom they have been said must, in order to succeed in an action for slander, allege and shew that, by reason of the words uttered, he has lost some material temporal advantage (*c*). In other words, in such a case damage is the gist of the action, and the plaintiff has to allege and prove, not general, but special damage, such as the loss of a situation or of the gratuitous hospitality of some particular person or persons (*d*).

Actions against sheriffs for neglect of duty afford another instance where actual damage has to be shewn to enable a plaintiff to succeed. Where a person has obtained a judgment against A. B., he has a right to the services of the sheriff in the execution of a writ of *fi. fa.* against the goods and chattels of A. B. in order to obtain the fruits of his judgment. But this right would seem to be a qualified and not an absolute one. Before the abolition of imprisonment for debt, a creditor who had obtained a judgment against his debtor, and who had charged the debtor in execution, had an absolute right to have the body of his debtor in gaol every hour till the debt was paid (*e*). But as regards the execution of a writ of *fi. fa.* against the goods and chattels of a judgment debtor, the right of the judgment creditor is to be saved from loss by the sheriff's delay; and if—assuming the sheriff had promptly put the writ into execution—the judgment creditor would have obtained nothing thereby, by reason, for

(*c*) See *Roberts and Wife v. Roberts*, 5 B. & S. 384; *ante*, p. 158.

(*d*) See *Knight v. Gibbs*, 1 A. & E. 43; *Davies and Wife v. Solomon*, L. R. 7 Q. B. 112.

(*e*) See *Williams v. Mostyn*, 4 M. & W. 145, 153.

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instance, of the debtor having no goods on which a levy could be made, no wrong could have been done to the creditor by delay on the part of the sheriff, and so the sheriff could not be made answerable in damages to him. And if the goods in the execution debtor's house are no longer the debtor's at the time when the sheriff ought to make a seizure under a writ of *fi. fa.*, but have been assigned to a third party by a valid bill of sale, the judgment creditor can be in no wise damnified by a neglect of the sheriff to seize the goods, or by the abandonment of them after a seizure, and so he cannot recover even nominal damages against the sheriff (*f*).

(1) In cases
of contract.

Measure of Damages.—First, with regard to the measure of damages in cases of *contract*, the general rule is that, “where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally—*i.e.*, according to the usual course of things—from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it” (*g*).

(2) In cases
of tort.

Somewhat similar principles apply in cases of tort, though, as regards the *quantum* of damages, much will of course depend upon whether the jury, under all the circumstances of each particular case, including the conduct of the parties, are disposed to be liberal to the plaintiff at the defendant's expense, or otherwise. Thus, in *Sharp v. Powell (h)*, Bovill, C.J., says: “No doubt, one who commits a wrongful act is responsible

(*f*) See *Stimson v. Farnham*, L. R. 7 Q. B. 175.

(*g*) *Hadley v. Baxendale*, 9 Ex. 341, 354; see also *Hydraulic Engineering Co. v. McHaffie*, 4 Q. B. D. 670; *Grebert-Borgnis v. Nugent*, 15 Q. B. D. 85; *Hammond v. Bussey*, 20 Q. B. D. 79. As to measure of damages under the Sale of Goods Act, 1893, see sects. 50–54.

(*h*) L. R. 7 C. P. 253, 258, *ante*, p. 7.

for the ordinary consequences which are likely to result therefrom; but, generally speaking, he is not liable for damage which is not the natural or ordinary consequence of such an act, unless it be shewn that he knows, or has reasonable means of knowing, that consequences not naturally resulting from the act are, by reason of some existing cause, likely to intervene so as to occasion damage to a third person.” CHAP. XI.

The oft-cited case of *Scott v. Shepherd* (i) will be useful in considering the question of liability for a tortious act. In that case the original thrower of the lighted squib was held liable in damages to the person who was injured by its bursting, although two other persons, to protect themselves and their wares, gave a new motion to the squib after it had left the thrower's hands. The Court considered that those two persons were not free agents in the matter, as they acted under a compulsive necessity for their own safety and self-preservation, and so that an action for trespass (which was the form of action used, where damage sustained was the “direct” consequence of a tortious act) would lie against the original thrower.

But can a person who commits a tortious act be liable for the “natural” (or, as some judges prefer to say, the “probable”) (k) and ordinary consequences of his act, where there is the intervention of a free agent between his act and the damage? It is clear that he may be so liable if the act is of such a nature that injurious consequences might have been anticipated from it.

A few cases may be cited in support of this proposition. The owner of a horse and cart left them unattended in the street. The plaintiff, a child of seven years of age, playing in the street with other boys, was getting into the cart, when one of them made the horse move on. The plaintiff was thrown down, and

(i) 2 Wm. Bl. 892; 1 Sm. L. C. 438.

(k) See per Grove, J., in *Sharp v. Powell*, L. R. 7 C. P. 253.

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the wheel of the cart went over his leg and fractured it, whereupon an action was brought on his behalf against the owner. It was urged by the defendant that the mischief was not produced by the mere negligence of his servant, but at most by that negligence in combination with two other causes: first, the advance of the horse in consequence of his being excited by one of the boys; and, secondly, the plaintiff's improper conduct in mounting the cart. On the former of these two causes the Court did not think it necessary to dwell at any length; "for," said Lord Denman in delivering judgment, "if I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first. If, for example, a gamekeeper, returning from his daily exercise, should rear his loaded gun against a wall in the playground of schoolboys, whom he knew to be in the habit of pointing toys in the shape of guns at one another, and one of these should playfully fire it off at a schoolfellow, and maim him, I think it will not be doubted that the gamekeeper must answer in damages to the wounded party." As to the plaintiff's improper conduct in mounting the cart, the Court did not think that that debarred him from succeeding in the action, for that the real cause of the accident was the negligence of the defendant's servant; and the plaintiff, though he acted without prudence or thought, had shewn these qualities in as great a degree as he could be expected to possess them (l).

In *The Bailiffs of Romney Marsh v. Trinity House* (m), a cutter belonging to the defendants, owing to the

(l) *Lynch v. Nurdin*, 1 Q. B. 29; but cf. *Mangan v. Atterton*, L. R. 1 Ex. 239. See also *Singleton v. Eastern Counties Railway Company* (1859), 7 C. B. N. S. 287.

(m) L. R. 5 Ex. 204, 7 Ex. 247.

negligence of the captain and crew, grounded upon a sandbank within three-quarters of a mile of a wall owned and kept in repair by the plaintiffs, the immediate effect of which was that the vessel became unmanageable and beyond the control of the crew. It was then blowing hard, and there was a flood tide, and so the vessel was driven with great violence against the wall, causing considerable damage to it. The defendants were held liable, for the negligence of their captain and crew was considered to be the *causa causans*, and not merely the *causa sine quâ non* of the damage. In other words, the vessel struck the bank through their negligence, and as it there became unmanageable, the inevitable result, owing to the state of the wind and tide, was, that it must be driven against the plaintiffs' sea-wall, and consequently the defendants were liable for the damage done.

Another and perhaps stronger case is *Clark v. Chambers* (n), where the defendant unlawfully blocked up a carriage road by placing an obstruction across it. Part of this obstruction consisted of a barrier armed with spikes, called *chevaux de frise*. Some persons, without the defendant's knowledge, removed the *chevaux de frise* barrier, and placed it in an upright position on the footpath. The plaintiff, on a very dark night, was lawfully passing along the road upon which the obstruction had been erected. He felt his way safely in the middle of the road through the opening caused by the removal of the *chevaux de frise*, and having done this, being wholly unaware that there was any obstruction on the footpath, he turned on to the latter, intending to walk along it the rest of the way. He had only advanced two or three steps when his eye came into collision with one of the *chevaux de frise* spikes, and was put out. The defendant was held answerable in damages to

(n) 3 Q. B. D. 327, 338. See *ante*, p. 7.

CHAP. XI. the plaintiff, for "a man who unlawfully places an obstruction across either a public or a private way may anticipate the removal of the obstruction, by some one entitled to use the way, as a thing likely to happen; and if this should be done, the probability is, that the obstruction so removed will, instead of being carried away altogether, be placed somewhere near. Thus, if the obstruction be on the carriage-way, it will very likely be placed, as was the case here, on the footpath." With regard to the *quantum* of damages to be awarded in such a case, of course that would be a question essentially for the jury, and the Court would rarely interfere with the amount awarded by them.

Where wrongful act of defendant induces third party to commit a tort.

Suppose the wrongful act of A. B. induces C. D. to commit another wrongful act, for which C. D. may be sued by the plaintiff, can A. B. be also made answerable in damages to the plaintiff? It is clear that in some cases, of which *Lumley v. Gye* (o) is a conspicuous example, this may be so. It is well-established law that an action will lie by a master against a person who wrongfully procures that a servant should unlawfully break his contract with him. But *Lumley v. Gye* goes somewhat further than this, for there it was held that the principle is not confined to cases where there is the relationship of master and servant strictly so called, and on demurrer it was decided by the majority of the Court that an action lay against the defendant for maliciously procuring Miss Wagner (who had agreed with the plaintiff to perform and sing at his theatre, and nowhere else, for a certain time) to break her contract, and not to perform and sing at the plaintiff's theatre during that time. The plaintiff's rights, in fact, were violated by the defendant having maliciously procured Miss Wagner to break her contract, and the plaintiff suffered temporal loss or damage, which was the natural and probable result of the defendant's

(o) 2 E. & B. 216. See *ante*, Chap. III.

wrongful act. The decision in *Lumley v. Gye* was followed in a later case by the Court of Appeal (*p*), when Brett, L.J., delivering the judgment of himself and Lord Chancellor Selborne (Lord Coleridge, C.J., dissenting), said: "Whenever a man does an act which, in fact and in law, is a wrongful act, and such an act as may, as a natural and probable consequence of it, produce injury to another, and which in the particular case does produce such an injury, an action on the case will lie. This is the proposition to be adduced from *Ashby v. White* (*q*). If these conditions are satisfied, the action does not the less lie because the natural and probable consequence of the act complained of is an act done by a third person, or because such act so done by the third person is a breach of duty or contract by him, or an act illegal on his part, or an act otherwise imposing an actionable liability on him. It has been said that the law implies that the act of the third party, being one which he has free will and power to do or not to do, is his own wilful act, and therefore is not the natural or probable result of the defendant's act. In many cases that may be so; but if the law is so to imply in every case, it will be an implication contrary to manifest truth and fact. It has been said that if the act of the third person is a breach of duty or contract by him, or is an act which it is illegal for him to do, the law will not recognise that it is a natural or probable consequence of the defendant's act. Again, if that were so held in all cases, the law would in some refuse to recognise what is manifestly true in fact. If the judgment of Lord Ellenborough in *Vicars v. Wilcocks* (*r*) requires this doctrine for its support, it is, in our opinion, wrong."

Allen v. Flood (*rr*), shews that the dicta in *Bowen v. Hall* go too far, and that the existence of an evil

(*p*) *Bowen v. Hall*, 6 Q. B. D. 333, 337; cf. *Allen v. Flood*, *infra*.

(*q*) 1 Sm. L. C. 268.

(*r*) 8 East, 1; 2 Sm. L. C. 577.

(*rr*) (1898) App. Cas. I, cited *ante*, Chap. III.

CHAP. XI. motive does not render a man liable for an act not in itself unlawful.

Recent cases
as to damages.

A few more recent cases may be added. It is not out of "the ordinary course of things" that a steamship whilst prosecuting one voyage should have secured employment for another adventure, and so, if it be damaged in a collision, the owners may recover the fair and ordinary earnings of such a vessel on such an adventure (s).

By the negligent navigation of a steamship a collision with a barque took place, and the latter lost her steering compass, charts, log and log-glass. The captain made for a port of safety as best he could, but owing to the loss of the above requisites for navigation, and without any negligence on the part of the captain or crew, the barque grounded and was necessarily abandoned; the grounding of the barque was held to be a natural and reasonable consequence of the collision (t).

Where a manufacturer's patent is infringed he may claim either (1) An account of profits made by the infringer, or (2) Damages for loss caused by the infringer who competes with the manufacturer by selling the same class of goods as his in the same market. In the former case it is material to consider how much of the patent was appropriated, so as to see what proportion of the infringer's net profits was attributable to its use. In the latter case the question is, What is the injury done to the manufacturer by the illegal sales of the infringer, and it is immaterial whether the profits of the infringer have been large or small, or whether he has infringed only a small part of

(s) *The Gracie v. The Argentino*, 14 App. Cas. 519.

(t) *The City of Lincoln*, 15 P. D. 15. See also *Mowbray v. Merryweather* (1895), 2 Q. B. 640. (Defendant supplied plaintiffs with defective chain, whereby plaintiffs' workman injured: defendant liable to plaintiff for damages paid to workman.)

the invention. If the manufacturer, by reason of the illegal competition, has been compelled to reduce his prices, the loss thereby caused may be included in the damages, due allowance being made for increased sales caused by such reduction, or by the connection and exertions of the infringer (*u*).

Where A. wrongfully makes use of B.'s land, *e.g.*, for tipping spoil, B. is entitled to damages, first, for the diminution in the value of his land, and, secondly, for the use which A. has made of it (*x*).

Remoteness of Damage.—There is another phrase, often used, defining the limits of a plaintiff's rights against a defendant, and that is that the damage for which he seeks compensation must not be too remote, though this in reality is but another form of stating that the damage, to enable a plaintiff to succeed in an action, must be the natural or probable consequence of the defendant's act. Thus, in *Ward v. Weeks* (*y*), the plaintiff sued the defendant for uttering of him the following words: "He is a rogue and a swindler; I know enough about him to hang him:" and alleged in his declaration as special damage that one Bryer, who was about to supply him with goods on credit necessary for the carrying on of his business as a general shopkeeper, refused to do so. The evidence was, that the defendant had spoken the words to one Bryce, and that Bryce had repeated them to Bryer, who thereupon refused to trust the plaintiff. Upon this a nonsuit was entered, and this was afterwards upheld, on the ground that, though every man must be taken to be answerable for the necessary consequences of his own wrongful acts, yet that the spontaneous and

Repetition of slander—whether a natural and probable consequence of its utterance.

(*u*) *United Horseshoe, &c., Co. v. Stewart*, 13 App. Cas. 401, as explained in *American Braided Wire Co. v. Thomson*, 44 Ch. D. 274.

(*x*) *Whitcomb v. Westminster Brymbo Coal and Coke Company* (1896) 2 Ch. 538.

(*y*) 7 Bing. 211.

CHAP. XI.

unauthorised repetition of the slander could not be considered as the necessary consequence of the original uttering of the words. What the plaintiff ought to have proved, but failed to prove, was, either that Bryer was present and heard the defendant make the representation to some person, or, at the very least, that when the defendant made such representation, he directed it to be communicated to Bryer.

The case just cited was followed in *Parkins v. Scott* (z), where the defendant's wife, in the presence of other persons, but in the absence of the plaintiff, addressed certain words to the plaintiff's wife, imputing adultery to her. The plaintiff's wife repeated the words to her husband, who thereupon refused to cohabit with her. In an action by the plaintiff and his wife against the defendant and his wife, the Court directed a nonsuit to be entered, because the male plaintiff had not been present when the slander was uttered, and the utterer had not authorised its repetition (a).

So far the rule seems clear enough ; but the case of *Riding v. Smith* (b) has created some difficulty on the subject. In that case a declaration was held good, which in substance stated that the plaintiff carried on business as a grocer and draper, and was assisted in the conduct of his business by his wife, and that the defendant falsely and maliciously published of the plaintiff's wife, in relation to the business, that she had committed adultery, whereby the plaintiff was injured in his business and sustained [special] damage. Now, here the plaintiff was unable to give any evidence that any of the persons who heard the defendant uttering the statement had ceased to resort to his shop, so

(z) 1 H. & C. 153.

(a) We are, of course, here dealing with remoteness of damage. It has already been pointed out that since 54 & 55 Vict. c. 51, *ante*, p. 164. a woman in bringing an action for words imputing unchastity or adultery to her, has not to prove special damage.

(b) 1 Ex. D. 91.

that the harm done may have been caused by the unauthorised repetition of the statement. Evidence was, however, given of a general falling-off in the profits of the business. If the decision in that case be right, it would seem to be so on the ground that the action was not so much an action for slander (for the plaintiff himself was not slandered) as an action "on the case" for a wrongful act done by the defendant, whereby the plaintiff was injured in his business. See especially the judgment of Kelly, C.B., according to which it would appear to be that if a statement were made—not a slander, but something else—calculated to injure the shopkeeper in the way of his trade; as, for instance, a statement that one of his shopmen was suffering from an infectious disease, such as scarlet fever; this would operate to prevent people coming to the shop, and an action could be maintained on the ground that a statement had been made to the public which would have the effect of preventing their resorting to his shop and buying goods of him (c).

In connection with this subject one cannot help saying that, though the doctrine laid down in *Ward v. Weeks* is accepted by the Court of Appeal (d), the speeches of some of the Lords in *Lynch v. Knight* (e) would give ground for hoping that the doctrine would not receive the approval of the highest tribunal. It may be wrong to repeat a slander, but, taking human nature as it is, is it not the ordinary and probable consequence of its utterance that it will be repeated, and should not the original utterer therefore be liable?

Other cases already cited may be referred to as useful guides when it is wished to ascertain whether the damage complained of is or is not too remote to be laid to the charge of a defendant. Thus, in *Cox v.*

(c) See also the judgment of Bowen, L.J., in *Ratcliffe v. Evans*, (1892), 2 Q. B. 524, at p. 534; see *ante*, p. 61.

(d) See *Bree v. Marescaux*, 7 Q. B. D. 434.

(e) 9 H. of L. Cas. 577; see *ante*, p. 157.

CHAP. XI. *Burbidge (f)* the owner of a horse, which was allowed by his negligence to stray upon the public highway, where it kicked a child, was not made to answer in damages, there being nothing to shew that the owner knew that the horse was of a vicious disposition. But in *Lee v. Riley (g)*, where the defendant's mare, escaping through a gate which he had neglected to keep in repair, into the plaintiff's field, kicked and injured the plaintiff's horse, the defendant was made answerable, as the damage was not too remote, but was a consequence which was ordinary or probable.

Again, *Sharpe v. Powell (h)* is another instance of a defendant having been held not liable for remote consequences flowing from his wrongful act. There defendant's servant, contrary to the provisions of a Police Act, washed a van in the public street, and allowed the water to run down a gutter towards a grating; but the grating being obstructed by ice (a fact which was not brought home to the knowledge of the defendant or his servant), the water spread for some feet over the roadway, forming a sheet of ice, upon which the plaintiff's horse fell and broke its knee. The natural consequence of the act of the defendant's servant would be that the water would run down the gutter and pass through the grating into the sewer. The stoppage was caused by an obstruction at the grating, which was not shewn to have been known to the defendant, and for which he was not responsible.

Where, owing to defendant's negligence, a collision with a railway train almost took place, but did not actually, damages for a nervous shock or mental injury caused by fright at such impending collision were held too remote (*i*).

(f) 13 C. B. N. S. 430.

(g) 18 C. B. N. S. 722.

(h) L. R. 7 C. P. 253; see *ante*, p. 250.

(i) *Victorian Railway Commissioners v. Coultas*, 13 App. Cas. 222; disapproved, however, in *Bell v. Great Northern Railway Company*, 26 L. R. (Ir.) Ex. D. 428. See also *Pugh v. London, Brighton and*

Special Damages.—The adjective “special” is often used in relation to damages, but not always with exactly the same meaning. Where a legal right has been disturbed the law presumes some damage, and the particular damage (beyond such general damage), which a party may recover, if he properly claims it in his pleadings, is called “special damage.” But when no legal right (apart from the damage done) has been disturbed, then the damage done is the wrong, and the term “special damage,” when used of this damage, denotes the actual and temporal loss which has in fact occurred. Again, the term “special damage” is used in actions brought for a public nuisance, such as the obstruction of a highway, to denote that actual and particular loss which a plaintiff must prove that he has sustained beyond what is sustained by the general public—if his action is to be supported, such particular loss being, as is obvious, the cause of action (*k*).

Vindictive or Exemplary Damages.—Little need be said as to damages of this description, which are awarded by juries where there has been a violation of personal freedom, or where insults have accompanied the tort committed, or the defendant’s conduct has been of a particularly gross nature (*l*). In seduction, for example, the ground of the action is, of course, loss of service, and the service which the plaintiff can prove may be very slight; but yet the jury may, and often do, take into account all that the parent may feel from the nature of the injury to his child, and so not only the wounded feelings but also the dishonour resulting from the defendant’s act may form part of the estimate of damages (*m*).

South Coast Railway Company (1896), 2 Q. B. 248 (illness owing to nervous shock from fright held to come under insurance against accidents); *Wilkinson v. Downton* (1897), 2 Q. B. 57 (damages recovered for nervous shock caused by defendant’s practical joke).

(*k*) *Ratcliffe v. Evans* (1892), 2 Q. B. 524, at p. 528; *ante*, p. 61.

(*l*) See *Merest v. Harvey*, 5 Taunt. 442.

(*m*) *Bedford v. M’Kowll*, 3 Esp. 119; *Andrews v. Askey*, 8 C. & P. 7.

CHAPTER XII.

LIMITATION OF ACTIONS FOR TORT.

CHAP. XII. In considering the question of damages for a tort and the Statutes of Limitations, one must bear in mind, that “it is a rule that when a thing directly wrongful in itself is done to a man, in itself a cause of action, he must, if he sues in respect of it, do so once and for all; as, if he is beaten or wounded, if he sues, he must sue for all his damage, past, present, or future, certain or contingent. He cannot maintain an action for a broken arm, and subsequently for a broken rib, though he did not know of it when he commenced his first action. But if he sustained two injuries from a blow, one to his person and another to his property—as, for instance, damage to a watch—there is no doubt that he could maintain two actions in respect of the one blow. . . . If he became bankrupt, the right in respect of the watch would vest in his trustee; that for damage to his person would remain in him. . . . The same would be true of an action for consequential damages. A man slandered or libelled by words actionable in themselves must sue, if at all, for all his damage in one action” (a). But suppose a slander were of such a kind that an action for it could not be maintained until damage had resulted from it, then it would seem that an action would lie every time a damage accrued from it. “For example,” continues Lord Bramwell, “A. says to B. that C. is a swindler; B. refuses to enter into a contract with C.; C. has a cause of action against A. D., who was present and

(a) Per Lord Bramwell in *Darley Main Colliery Company v. Mitchell*, 11 App. Cas. 127, at p. 145; see *Brunsdon v. Humphrey*, 14 Q. B. D. 141.

heard it, also refuses to make such a contract ; surely another action would lie. And so one would think if B. subsequently refuses another contract.” CHAP. XII.

Let us now consider a different class of cases, where the act which causes the damage is not in itself wrongful. In that case, the cause of action will not accrue till the damage occurs. This can best be illustrated by the case where one man is the owner of land and another the owner of the minerals beneath the land. By the judgments of the House of Lords in the two cases of *Backhouse v. Bonomi* (b), and *Darley Main Colliery Company v. Mitchell* (c), the law on the subject is now quite clear.

(1) The owner of the surface has a natural and legal right to the undisturbed enjoyment of that surface in the absence of any binding agreement to the contrary.

(2) The owner of the subjacent minerals may excavate and remove them to the utmost extent, but should exercise that right so as not to disturb the lawful enjoyment of the owner of the surface.

(3) The excavation and removal of the minerals do not *per se* constitute any actionable invasion of the right of the owner of the surface, although subsequent events shew that no adequate supports have been left to maintain the surface.

(4) But when, in consequence of not leaving or providing sufficient supports, a disturbance of the surface takes place, that disturbance is an invasion of the right of the owner of the surface, and constitutes his cause of action.

These four propositions will be found in the speech of Lord Fitzgerald in *Darley Main Colliery Company v.*

(b) 9 H. of L. Cas. 503.

(c) 11 App. Cas. 127 ; followed in *Crumbie v. Wallsend Local Board* (1891), 1 Q. B. 502.

CHAP. XII. *Mitchell (d)*. In that case the appellants, the Colliery Company, who were the lessees of coal under the respondent's land, worked the coal so as to cause a subsidence of the land and injury to the houses thereon in 1868. For the injury thus caused they made compensation and executed certain repairs. They never worked the coal after 1868; but in 1882 a further subsidence took place, causing further injury. There would have been no further subsidence if an adjoining owner had not worked his coal (which he did in 1881), or if the appellants had left sufficient support under the respondent's land. The working by the adjoining owner caused "a creep," and a further subsidence of the land. Under these circumstances it was held by the House of Lords (Lord Blackburn dissenting) that the cause of action in respect of the further subsidence did not arise till that subsidence occurred, and that the respondent could maintain an action for the damage thereby caused, although more than six years had elapsed since the last working by the appellants. As stated in the judgment, there was a complete cause of action in 1868, in respect of which compensation was given, but there was a liability to further disturbance of the surface of the land. The appellants permitted that state of things to continue without taking any steps to prevent the occurrence of any future injury. A fresh subsidence took place, causing a new and further disturbance of the respondent's enjoyment, which gave him a new and distinct cause of action.

Periods allowed for bringing actions for torts.

It now remains to set out the periods allowed by statute for bringing actions of tort. The principal statute on the subject is 21 Jac. I. c. 16, the effect of s. 3 of which is, that an action for slander (subject to what has been said where the slander is not actionable without proof of special damage) must be brought

within two years from the speaking of the words (e); **CHAP. XII.**
 actions for assault, battery, wounding, or imprisonment must be brought within four years after the cause of action has arisen; whilst the period allowed for bringing actions for trespass to land or to goods, detinue, trover, replevin, libel, and other actions on the case not otherwise dealt with, is six years.

By 24 Geo. II. c. 44, s. 8, actions against constables for acts done by them acting under a justice's warrant, and by 11 & 12 Vict. c. 44, s. 8, actions against justices for acts done by them acting as justices, must be brought within six months.

By 3 & 4 Will. IV. c. 42, s. 2, where injuries have been done to the real estate of a deceased person within six months before his death, his representatives have only twelve months from his death to sue therefor; and by the same section, where a deceased person has, within six months of his death, committed injury to the real or personal estate of another, his representatives can only be sued within a period of six months from the time they take upon themselves the administration of his estate.

The period for bringing actions under Lord Campbell's Act (9 & 10 Vict. c. 93), where a person's death has been caused by the wrongful act of another, is limited to twelve months; and the periods allowed by the Employers' Liability Act (43 & 44 Vict. c. 42), for bringing actions under that Act, are six months from the occurrence of the accident causing the injury, or, in case of death, twelve months from the time of death.

By the Public Authorities Protection Act, 1893, an action, prosecution, or other proceeding against any person for any act done, in pursuance, or execution, 56 & 57 Vict. c. 61.

(e) Where the words are actionable *per se*: if special damage necessary, the time runs from the time the special damage accrues: *Saunders v. Edwards*, 1 Sid. 95.

CHAP. XII. or intended execution, of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of such Act, duty, or authority, must be instituted within six months next after the act, neglect, or default complained of, or, in the case of a continuance of injury or damage, within six months next after the ceasing thereof.

Further
periods in case
of certain
disabilities.

By the above-mentioned 21 Jac. I. c. 16, s. 7, it was provided that in the case of a person who at the date of the accrual of a cause of action to him or her was under age, a *feme covert*, *non compos mentis*, imprisoned or beyond the seas, the statute was not to run till the removal of the disability. But now by s. 10 of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), this provision is abolished as regards persons imprisoned or beyond the seas; and it would seem to be abolished as regards a *feme covert* also, as the Married Women's Property Act, 1882, by s. 1, sub-s. 2, enables a married woman to sue in tort as if she were a *feme sole* (*f*).

The operation of the Statutes of Limitations is also qualified by a well-known rule borrowed from the Courts of Equity, namely, that where the existence of a cause of action has been actively concealed from the person who ought to take advantage of it by the fraud of the person who creates it, such person shall not take advantage of the wrong which he himself has done, and so a fresh cause of action accrues from the moment that the fraud is discovered (*g*).

The Statutes will not begin to run till there is a complete cause of action. Thus, a railway company,

(*f*) See *Weldon v. Neal*, 51 L. T. 289.

(*g*) See and *cf.* *Gibbs v. Guild*, 9 Q. B. D. 59; *Barber v. Houston*, 14 L. R. (Ir.), 273; 18 L. R. (Ir.), 475; *Thorne v. Heard* (1895), App. Cas. 495.

in consequence of a forged transfer, registered railway stock belonging to A. in the name of another person. The forgery was afterwards discovered, and the company informed of it, but they refused to treat A. as the stockholder: held that the cause of action was not complete until such refusal took place (*h*). Again, a lease belonging to the plaintiff was fraudulently taken from him by his son, and deposited, without the plaintiff's knowledge, with B., in 1881, as security for a loan. B. held the lease without knowledge of the fraud, and became bankrupt, whereupon his trustee, in 1889, assigned the debt to the defendant, and handed over the lease to him. The plaintiff subsequently demanded the lease from the defendant, and on his refusal to return it, brought an action for it, to which action the defendant pleaded the Statute of Limitation. It was held that the Statute began to run only from the time when the plaintiff had a complete cause of action against the defendant (*viz.*, the date of the demand and refusal), irrespective of the question whether he had a complete cause of action against B., and so that the Statute was no answer to the action (*i*).

(*h*) *Barton v. North Staffordshire Railway Company*, 38 Ch. D. 458.

(*i*) *Miller v. Dell* (1891), 1 Q. B. 468.

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